FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JULY 1, 1978 TO DECEMBER 31, 1978

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Took oath of office August 26, 1976

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Took oath of office June 29, 1978

CAROL M. THOMAS, *Secretary*
Appointed June 20, 1977

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FEDERAL TRADE COMMISSION DECISIONS
Findings, Opinions and Orders

IN THE MATTER OF

RETAIL CREDIT COMPANY

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8920. Complaint, March 9, 1978 — Final Order, July 7, 1978

This order, among other things, requires an Atlanta, Ga. collector and seller of consumer credit information to divest itself completely, within one year, of the Credit Bureau of Salem, Oregon (CB West Coast), and The Credit Bureau of Washington, D.C., subject to Commission approval; and provide purchaser, for three years, with copies of its current files in a form that will permit acquirer to prepare and sell credit reports. The order additionally bars the firm, for ten years, from entering into management contracts with divested corporations, and from acquiring, without prior Commission sanction, any concern engaged in the business of collecting and reporting consumer credit information.

Appearances

For the Commission: *William M. Sexton, David J. Hill, Philip B. Beardsley, Harold E. Kirtz* and *Brian L. Dillard.*

For the respondent: *J. Wallace Adair, Francis A. O'Brien* and *Kenneth E. Krosin, Howrey & Simon,* Washington, D.C. and *Kent E. Mast, Hansel, Post, Branden & Dorsey,* Atlanta, Ga.

COMPLAINT

The Federal Trade Commission has reason to believe that Retail Credit Company has made certain acquisitions, as hereinafter described, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45). Accordingly, the Commission hereby issues its complaint, stating its charges with respect thereto as follows:

DEFINITIONS

PARAGRAPH 1. For the purposes of this complaint the following definitions apply:

a) "credit reporting agency" - a firm engaged in gathering, recording and disseminating information relative to the credit

worthiness, financial responsibility, and paying habits of consumers, firms, corporations, and any other legal entity being considered for credit extention.

b) "credit grantor" - a firm that extends credit to its customers in carrying on its business.

c) "credit investigative agency" - a firm primarily engaged in gathering, recording and disseminating information relative to the character, financial responsibility and/or insurability of consumers, firms, corporations, and any [2] other legal entity being considered as an applicant for life, health, casualty or other insurance, or for a loan by a lending institution.

d) "personnel reporting agency" - a firm engaged in gathering, recording, and disseminating information relative to the character and financial responsibility of consumers for use by employers in determining job applicants' employability.

RESPONDENT

PAR. 2. Respondent, Retail Credit Company (Retail Credit), is a corporation organized and existing under the laws of the State of Georgia, with its offices and principal place of business located at 1600 Peachtree St., N.W., Atlanta, Georgia.

PAR. 3. Retail Credit and its wholly-owned subsidiaries, Retailers Commercial Agency, Inc. (Retailers), the Credit Bureau, Incorporated, of Georgia, the Credit Bureau, Incorporated, of Salem, Oregon and Credit Marketing Services, Inc., are engaged in the business of securing and storing information about consumers and selling such information to business concerns to assist them in making business decisions. Within this broad service market, Retail Credit (1) is engaged in the sale to insurance companies of reports about consumers for use in determining insurability and rate classification (insurance reporting); (2) prepares and sells personnel reports; (3) prepares and sells credit reports both locally and in the non-local credit reporting market; and (4) provides credit card recovery, insurance claims reports, market research, and other miscellaneous services for business customers. The company and its subsidiaries have compiled files on 72.3 million people consisting of previous reports, newspaper clippings, and available public records. Retail Credit's offices are located nationwide and can provide information on 98 percent of the population of the United States. Information contained in the parent company's files (on 48 million people) is available to its subsidiaries upon request.

PAR. 4. Revenues of Retail Credit in 1970 totalled $183 million, resulting in income before taxes of $18.2 million. Assets totalled $60

million as of the end of calendar year 1970. The company ranks first in sales of life and health insurance [3] reports, first in sales of fire and casualty reports, second in sales of credit reports in the non-local credit reporting submarket, and is a leading factor in the personnel reporting submarket. Retail Credit has three times as many credit bureaus located nationwide as any competitor. The company has a dominant position in the sale of credit reports in the following, among other, standard metropolitan statistical areas (SMSA's): Washington, D.C.; San Francisco Bay area; Portland, Oregon; Atlanta, Georgia; and Miami, Florida.

PAR. 5. In 1970, insurance reporting accounted for 62 percent of Retail Credit's total revenues. Personnel reporting accounted for 8 percent, credit and commercial reporting 18 percent, and claims services 11 percent. The company's retained earnings increased from $17 million in January 1965, to $31 million at the end of calendar 1970.

PAR. 6. Retail Credit has acquired 91 credit bureaus since 1960. Seventy-eight of these acquisitions have been made since 1966. The company now owns 114 credit bureaus in the United States, the total having doubled since the end of calendar 1967.

PAR. 7. At all times relevant herein, Retail Credit sold and shipped products and provided its services in interstate commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

TRADE AND COMMERCE

PAR. 8. The relevant service market for purposes of this proceeding is the gathering and reporting of information on individuals to businesses for insurance, claim, credit, employment, and marketing purposes. Within this broad market exist a number of submarkets, including the following:

a) *Local Credit Reporting* - the furnishing of credit information on local residents by consumer credit reporting agencies to local credit grantors for use in determining whether to extend credit to consumer applicants.

b) *Non-Local Credit Reporting* - the furnishing of credit information on local residents by consumer credit reporting agencies to credit grantors located outside the local metropolitan area, or on non-local residents to credit grantors located within the local metropolitan area, for use in determining whether to extend credit to consumer applicants. [4]

c) *Life and Health Insurance Reporting* - the furnishing of life and health insurance reports by credit investigative agencies for

insurance companies' use in determining insurability and rate classification.

d) *Fire and Casualty Insurance Reporting* - the furnishing of fire and casualty insurance reports by credit investigative agencies for insurance companies' use in determining insurability and rate classification.

e) *Personnel Reporting* - the furnishing of personnel reports by credit reporting agencies and credit investigative agencies to employers to determine job applicants' employability.

PAR. 9. The submarkets described in Paragraph 8, above, are the relevant markets in which to measure anticompetitive effects resulting from the challenged acquisitions. The structures of these submarkets are as follows:

a) *Local Credit Reporting Submarket* – the number of competitors and degree of concentration vary from one metropolitan area to another. Normally only a few significant credit bureaus exist in a major metropolitan area, although fringe competitors may exist on the edge of the market. Nationwide, Retail Credit and its subsidiaries in 1970 accounted for about 10 percent of the market's estimated $80 to $90 million volume, an increase from approximately 3.5 percent in 1965. Although local credit reporting figures on a nationwide basis presently show an unconcentrated industry, the increase in overall national concentration since 1966 is substantial. This trend has been hastened by widespread acquisitions throughout the country since 1965.

b) *Non-Local Credit Reporting Submarket* - this market is highly concentrated with the leading firm having approximately 32 percent of the 1970 industry volume of $40 to $45 million. This firm acts as a sales agent for a nationwide system of credit bureaus. Retail Credit ranks second in the market with approximately 15 percent. [5]

The leading four firms have approximately 58 percent of total volume. Brokerage operations, direct sales by independent bureaus and interbureau coupon sales account for the remainder of the market.

c) *Life and Health Insurance Reporting Submarket* – Retail Credit has maintained a market share of over 80 percent of this submarket for a number of years. The challenged acquisitions did not increase Retail Credit's market share. The three leading firms accounted for 90 to 95 percent of 1970 industry volume of $55 to $60 million, with the remaining few percent held by various small reporting agencies.

d) *Fire and Casualty Insurance Reporting Submarket* – Retail Credit's market share of approximately 50–60 percent of this highly

concentrated submarket was not increased by the challenged acquisitions. The leading three firms had an estimated 60 to 70 percent of 1970 industry volume estimated at $120 to $130 million. The remainder of the market was accounted for by smaller companies operating on a local or regional basis.

e) *Personnel Reporting Submarket* – Retail Credit is a leading factor among those companies offering personnel reporting service to local, regional and national customers. 1970 volume in this submarket is estimated at between $25 and $35 million. Most credit bureaus offer personnel reporting as part of their services. The challenged acquisitions marginally increased Retail Credit's market share.

ACQUISITIONS BEING CHALLENGED

PAR. 10. The Credit Bureau, Inc. (CB West Coast), an Oregon corporation, was acquired in January 1970. This chain included major credit bureaus located in San Francisco, San Jose and Oakland, California; Portland, Salem and Eugene, Oregon; Everett and Tacoma, Washington; Boise, Idaho; plus other credit bureaus located in California, Oregon, Washington, and Idaho, for a total of 43 bureaus. In the San Francisco Bay area, CB West Coast-owned credit bureaus accounted for [6] 50 to 60 percent of total credit reporting revenue, while 12 small bureaus, Credit Data Corporation and smaller credit reporting agencies divided the remainder of the market. In January 1971, Retail Credit acquired another credit bureau in the Bay area. In Portland, the CB West Coast bureau accounted for approximately 22 percent of total credit reporting revenue and had only one significant competitor. In the remaining above-listed metropolitan areas, CB West Coast operated credit bureaus that had a dominant or monopolistic position. CB West Coast credit reporting revenues for 1969 totalled $4.2 million. Prior to the merger, Retail Credit operated offices or suboffices in all major metropolitan areas on the Pacific Coast. The company operated Retailers offices in Tacoma and Seattle, Washington; San Jose, San Francisco, Sacramento, and Oakland, California; and Portland, Oregon.

PAR. 11. The Credit Bureau, Inc. (CB D.C.), a District of Columbia corporation, was purchased on October 29, 1970, for $3 million. CB D.C. had merged with its major competitor, Stone's Mercantile Agency (Stone), in December 1969. CB D.C. and Stone together accounted for at least 75 to 80 percent of total credit reporting revenue in the Washington SMSA in 1969, and were the only two significant firms primarily engaged in consumer credit reporting for local business enterprises. At the time of the acquisition Retail

Credit owned credit bureaus located in Annapolis and Hagerstown, Maryland, and operated Retail Credit offices in Alexandria, Virginia, and Silver Spring and Suitland, Maryland, and operated a Retailers office in Washington, D.C.

PAR. 12. The Retail Credit Association of Portland, Oregon, Inc. (CB Portland), an Oregon corporation, was acquired by Retail Credit on January 2, 1971. CB Portland was, at the time of the acquisition, the largest credit bureau in the State and the only significant local firm primarily engaged in consumer credit reporting in competition with Credit Bureau Metro of Portland, which was part of the CB West Coast chain acquired by Retail Credit in January 1970.

PAR. 13. CB West Coast, CB D.C., and CB Portland each were engaged in the sale of credit reports in the local and non-local markets prior to the acquisitions. Because of their location in major regional centers, the acquired companies are potential members of any competitive national system challenging Retail Credit's dominance in insurance reporting, even though the companies could provide only local competition in insurance reporting as independent factors. Each of the acquired companies engaged in personnel reporting prior to the acquisition. [7]

PAR. 14. At all times relevant herein, CB West Coast, CB D.C., and CB Portland each sold and shipped products and provided its services in interstate commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

EFFECTS OF ACQUISITION

PAR. 15. The effect of the acquisitions of CB West Coast, CB D.C., and CB Portland, and each of them, may be to substantially lessen competition or to tend to create a monopoly in the relevant market, which is the gathering and reporting of information on consumers to businesses for insurance, claim, credit, employment, and marketing purposes, or submarkets thereof, in the United States as a whole or in various sections thereof, in the following ways, among others:

a) in Portland, Oregon, Washington, D.C., the San Francisco Bay area, and in various metropolitan areas in the Pacific Northwest, the acquisitions:

(i) eliminated Retail Credit offices located in these areas as potential competitors in the local credit reporting markets;

(ii) eliminated the acquired credit bureaus as actual competitors in the non-local credit reporting market of Retail Credit offices located in these areas;

(iii) eliminated the acquired credit bureaus as actual competitors

in the local and non-local credit reporting markets of Retailers offices located in these areas.

b) in the non-local credit reporting submarket, the acquisitions have increased concentration in an already highly concentrated market; [8]

c) the substitution of Retail Credit for the previously independent bureaus may raise barriers to entry in the local and non-local credit reporting markets;

d) the potential withdrawal by Retail Credit of the acquired bureaus from existing non-local credit reporting systems would lessen effective competition in the non-local market;

e) in the personnel reporting submarket, the acquisitions have increased concentration and eliminated actual competition;

f) in the insurance reporting submarkets, the acquisitions eliminate the potential competition of the acquired bureaus as a part of competitive reporting systems and as independent factors;

g) the combination of Retail Credit, Retailers, and the acquired credit bureaus gives Retail Credit strong competitive advantages vis-a-vis its insurance reporting competitors by adding to the company's reporting resources in the acquired credit bureaus' metropolitan areas, thereby increasing the barriers to entry into insurance reporting;

h) further mergers and acquisitions in the industry may be encouraged.

VIOLATIONS

PAR. 16. The acquisition of CB West Coast, CB D.C., and CB Portland, separately and as a series, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. 18), as amended, and a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as amended.

INITIAL DECISION BY MONTGOMERY K. HYUN, ADMINISTRATIVE LAW JUDGE

FEBRUARY 10, 1976

PRELIMINARY STATEMENT

On March 9, 1973, the Federal Trade Commission ("Commission") issued the complaint herein, charging respondent Retail Credit Company ("Retail Credit" or "RCC") with violations of Section 7 of the Clayton Act, as amended. (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended. (15 U.S.C. 45), by [2]

reason of respondent's January 1970 acquisition of Credit Bureaus, Inc. ("CB West Coast"), of Salem, Oregon, its October 1970 acquisition of The Credit Bureau, Inc. ("CBDC"), of Washington, D.C., and its January 1971 acquisition of The Retail Credit Association of Portland, Oregon, Inc. ("CB Portland"), of Portland, Oregon. The complaint alleged generally that the effect of these acquisitions may be to lessen competition substantially or to tend to create a monopoly in the relevant market, namely, "the gathering and reporting of information on consumers to businesses for insurance, claim, credit, employment, and marketing purposes," or submarkets thereof, in the United States as a whole or in various sections thereof.

More specifically, the complaint alleged that (Paragraph 15 of the complaint):

a) in Portland, Oregon, Washington, D.C., the San Francisco Bay area, and in various metropolitan areas in the Pacific Northwest, the acquisitions:

(i) eliminated Retail Credit offices located in these areas as potential competitors in the local credit reporting markets;

(ii) eliminated the acquired credit bureaus as actual competitors of Retail Credit offices in the non-local credit reporting market;

(iii) eliminated the acquired credit bureaus as actual competitors of Retailers' offices in the local and non-local credit reporting markets;

b) in the non-local credit reporting submarket, the acquisition increased concentration in an already highly concentrated market;

c) the substitution of Retail Credit for the previously independent credit bureaus may raise barriers to entry in the local and non-local credit reporting markets; [3]

d) the potential withdrawal by Retail Credit of the acquired credit bureaus from existing non-local credit reporting systems would lessen competition in the non-local market;

e) in the personnel reporting submarket, the acquisitions have increased concentration and eliminated actual competition;

f) in the insurance reporting submarkets, the acquisitions eliminate the potential competition of the acquired credit bureaus as a part of competitive reporting system and as independent factors;

g) the combination of Retail Credit, Retailers Commercial Agency ("R C A") and the acquired credit bureaus gives respondent strong competitive advantage over its insurance reporting competitors by adding to its reporting resources in the acquired credit bureaus' market areas, thereby increasing the barriers to entry into insurance reporting; and

h) further mergers and acquisitions in the industry may be encouraged.

On May 18, 1973, respondent duly filed its answer admitting certain allegations but denying the bulk of the complaint allegations and further asserting that CB West Coast was a failing company at the time of its acquisition by respondent.

Prehearing conferences were held in June and August 1973 and February and March 1974. The case was reassigned to me on January 7, 1974. In response to my direction to define more specifically the geographic areas in which anticompetitive effects have taken place with respect to the various product markets alleged in the complaint, complaint counsel specified the following markets:

1. Local credit reporting —

(a) Washington, D.C., consisting of Washington, D.C.; Charles, Montgomery, Prince George's Counties, Maryland, the cities of Alexandria, [4] Fairfax and Falls Church, Virginia; Arlington, Fairfax, Loudoun and Prince William Counties, Virginia.

(b) Portland, Oregon, consisting of Clackamas, Multnomah and Washington Counties, Oregon; and Clark County, Washington.

(c) Salem, Oregon, consisting of Marion and Polk Counties, Oregon.

(d) Eugene, Oregon, consisting of Lane County, Oregon.

(e) Tacoma, Washington, consisting of Pierce County, Washington.

(f) Boise, Idaho, consisting of Ada County, Idaho.

(g) San Francisco Bay area, consisting of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano and Sonoma Counties, California.

2. Non-local credit reporting—the nation as a whole.

3. Life and health insurance reporting—the nation as a whole.

4. Fire and casualty insurance reporting—the nation as a whole.

5. Personnel reporting—the same as in 1 above and also the nation as a whole.

(See Response To The Administrative Law Judge's Directive To Define Geographic Areas In Which Anticompetitive Effects Have Taken Place, March 15, 1974; complaint counsel's Trial Brief, April 15, 1974)

Evidentiary hearings for complaint counsel's case-in-chief began on May 6, 1974 and continued, with interruptions for the convenience of counsel and witnesses, until October 3, 1974. Defense hearings began on October 3, 1974 [5] and continued, with interruptions for the convenience of witnesses and counsel, until May 27, 1975. Rebuttal hearings began on June 18, 1975 and

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continued, with interruptions, until June 30, 1975. The record was closed on July 21, 1975 after receiving into evidence certain documents recently obtained by respondent under the Freedom of Information Act. Thirty-six witnesses were called by complaint counsel in support of the case-in-chief, and forty-seven by respondent in its defense. Complaint counsel called three witnesses in rebuttal. The transcript exceeds 15,000 pages, and some 550 exhibits were received in evidence. The parties filed proposed findings of fact and conclusions of law on September 10, 1975 and reply briefs on September 30, 1975.

This case is before me upon the complaint, answer, testimony and other documentary evidence, proposed findings of fact and conclusions of law and briefs filed by the parties. These submissions have been given careful consideration and, to the extent not adopted herein in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this initial decision, are denied.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings of fact and conclusions of law submitted by the parties, the administrative law judge makes the findings and conclusions set forth below.[1] [6]

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[1] References to the record and other material are given in parentheses, and the following abbreviations are used:

F - Findings of this initial decision.
CPF - Complaint counsel's proposed findings, followed by the number of the proposed finding referred to.
CRB - Complaint counsel's reply brief, followed by the page numbers.
RPF - Respondent's proposed findings, followed by the number of the proposed finding referred to.
RRB - Respondent's reply brief, followed by the page number.
CX - Complaint counsel's exhibits.
RX - Respondent's exhibits.
JX - The joint exhibit, followed by the page numbers.

The following abbreviations are used throughout the findings:

Retail Credit Company	Retail Credit or RCC
The Credit Bureau, Inc. of Georgia	CBI
Retailers Commercial Agency, Inc.	RCA
Credit Marketing Services, Inc.	CMS
Credit Bureaus, Inc. of Salem, Oregon	CB West Coast
The Credit Bureau, Inc. of Washington, D.C.	CBDC
Retail Credit Association of Portland, Oregon, Inc.	CB Portland
Associated Credit Bureaus, Inc.	ACB
Credit Bureau Reports, Inc.	CBR
Credit Services International, Inc.	CSI
Credit Data Corporation	CDC
The Credit Data Division of TRW, Inc.	TRW Credit Data
Trans Union Systems Corporation	Trans Union
Associated Credit Services, Inc.	ACS

1 Initial Decision

FINDINGS OF FACT

I. IDENTITY AND BUSINESS OF RESPONDENT RETAIL CREDIT COMPANY

A. Retail Credit Company

1. Retail Credit Company (hereinafter sometimes referred to as "respondent," "Retail Credit" or "RCC") is a corporation organized and existing under the laws of the State of Georgia, with its offices and principal place of business located at 1600 Peachtree St., N.W., Atlanta, Georgia. (Complaint and Answer, par. 2) [7]

2. Respondent was incorporated in the State of Georgia on December 20, 1913, after beginning operations in Atlanta, Georgia, in 1899 as a credit bureau. (CX 47a; CX 354c)

3. Respondent, directly or indirectly through its subsidiaries, provides business firms throughout the United States with information on individuals for insurance, claims, credit, employment and marketing purposes. (CX 117a; CX 622b) In 1970, insurance reporting accounted for 62 percent of respondent's business volume, credit and other commercial reporting for 18 percent, claims reporting for 11 percent, and employment reporting for 8 percent. (CX 167c, h; CX 197f)

4. As of February 1971, Retail Credit and its subsidiaries operated approximately 1,700 offices and suboffices; 15,000 employees performed over 400 report services, with approximately half of those employees comprising the corps of trained information-gatherers. In its various offices, respondent maintained files on approximately 72 million consumers throughout the country. (CX 167 1; CX 177; CX 197d; CX 354a; CX 363z37a; CX 364n)

5. Respondent's revenues, income and assets in the years 1964–1971 were (in millions of dollars):

	1964	*1965*	*1966*	*1967*	*1968*	*1969*	*1970*	*1971*
Total revenue:	$108.5	117.9	126.3	134.9	148.6	161.1	183.4	190.8
Net income before taxes:	$ 13.6	15.2	15.5	16.2	17.5	19.1	19.0	19.1
Retained earnings:	$ 17.4	20.7	23.9	26.7	29.0	31.9	30.8	34.4
Total assets:	$ 34.2	38.2	42.2	47.1	50.5	52.2	60.3	65.0

(CX 51, pp. 10–11; CX 117e, f; CX 363z17, z18, z25, z25a, z33, z33a, z39a, z40)

6. At all times relevant herein, Retail Credit Company and each of the companies acquired by it, Credit Bureaus, Inc. of Salem, Oregon, The Credit Bureau, Inc. of Washington, D.C. [8] and the

Retail Credit Association of Portland, Oregon, Inc., were engaged in interstate commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. (Complaint and Answer, pars. 7, 14; Tr. 1506)

7. Retail Credit Company owns all of the stock of the following subsidiary companies:

> Atwell, Vogel & Sterling, Inc.; The Credit Bureau, Inc. of Georgia; Credit Bureau of Montreal, Ltd.; Gay & Taylor, Inc.; Hunnicutt & Associates, Inc.; Physical Measurements, Inc.; Retail Credit Company of Canada Ltd.; Retailers Commercial Agency, Inc.
> (CX 579m)

8. Respondent's RCC offices employ over 5000 full-time field representatives working in more than 1400 cities in the United States and Canada and maintain files on 48 million consumers. (CX 569e; CX 34a; CX 354d; CX 364n)

9. Respondent, through its RCC offices, is primarily engaged in providing a variety of services by which customers may obtain information upon consumers and others on the basis of which such customers may make business decisions for insurance and employment purposes. (Flory 10,044–045, 10,048–050, 10,112–114, 10,161–162; Burge 11,014, 11,071–072, 11,120; Rutherford 13,187–188) Many of RCC's customers are insurance companies, which utilize its services to obtain information for use in determining insurability, ratings or classifications for life, health, property, marine and automobile insurance purposes. (Nead 2875; Mitchem 3662; Bretherick 9357–58; Alley 9405; Flory 10,467–468, 10,100–101; Burge 11,069; CX 364k) RCC prepares written reports on the basis of investigation of the subject by its field representatives. (RX 249 through RX 256)

10. As part of the services provided to life and health and fire and casualty insurance companies, RCC operates a division for claims settlement and two companies called Physical Measurement, Inc. and Gay & Taylor. RCC's experienced claim investigators in nearly 300 cities investigate [9] and settle claims under life, health and fire and casualty policies. Physical Measurements is a chain of approximately 70 health history gathering centers and 73 branch offices located in major metropolitan areas which were established to speed the processing of life and health insurance applications. Gay & Taylor, an affiliate of RCC acquired in January 1970, is one of the largest multiple line insurance adjustment companies in the world. It provides services in the following areas: accident, health, life, automobile, aviation, casualty, fire, marine, fidelity, surety, mobile

homes, workmen's compensation, and catastrophes. During the two years following RCC's acquisition of Gay & Taylor, RCC purchased nine other claims adjusting companies in the States of Florida, Georgia, Virginia and Missouri and operated them as branch offices of Gay & Taylor. (CX 9, pp. 13, 30; CX 23, p. 29; CX 24, p. 18; CX 25z16–z19; CX 34; CX 44f; CX 51, pp. 6, 8; CX 79, pp. 2–3; CX 105; CX 167j, k; CX 354e; CX 363z38a; CX 569i)

11. Atwell, Vogel & Sterling performs audit inspection and loss control services, areas that are related to the insurance market. Such services are performed nationally and include inspection of building elevators for insurance purposes, safety and loss control programs, payroll audits, and inspections regarding fire, liability, burglary, and workmen's compensation, among other types of risks. (CX 25z8–z11; CX 74f; CX 354e; CX 167j)

12. RCC also provides employers with reports on prospective employees. Pre-employment investigations provide information concerning job history, employment experience, character, and skills of prospective employees so that businesses can select the best prospects for job openings. (CX 21e; CX 363z38a) The types of reports prepared and sold by RCC include the following: personnel selection reports; security personnel reports, when security or confidentiality is a factor; salesman selection reports; employment experience reports for clerical and industrial personnel; and reports concerning employees' progress. (CX 9, p. 33; CX 20; CX 21; CX 23, pp. 34–39; CX 25z–z2; CX 140; CX 354e)

13. RCC's credit reporting services fall within what it terms its "commercial" market, which consists principally of credit services and marketing information services. [10] (CX 23, p. 40) The credit services performed include the following: reports on individuals, farmers, and firms; character-financial reports; employment verification and trade reports; worth and income reports requested by mailorder houses, hospitals and medical clinics; individual, farmer and firm reports for use by petroleum product marketers; mortgage loan reports; tenant reports; prospective customer reports; skip and locate reports; slow payer reports; credit card pick-up service; and collection letters. (CX 9, pp. 34–36; CX 24, pp. 21–22; CX 25z3–z5; CX 30; CX 64; CX 75; Rutherford 13,333–336, 13,346, 13,490–493, 13,515)

14. RCC reporting volume in the United States for the years indicated is as follows:

RCC (parent company only)

	1965 (000)		*1967* (000)		*1969* (000)		*1970(b)* (000)	
	No.	*$*	*No.*	*$*	*No.*	*$*	*No.*	*$*
Total Reports(a)	27,355	99,027	27,480	112,118	27,812	128,212	26,000	136,041
Personnel	1,434	10,195	1,658	13,165	1,644	14,611	1,393	12,817

Insurance	23,945	74,275	23,773	81,505	24,523	92,510	(c)	
Life & Health	6,969	31,230	6,931	34,175	7,066	39,657	7,152	42,973
Fire & Casualty	17,094	43,046	16,891	47,330	17,511	52,850	(c)	
Claims	677	8,657	779	11,250	330	13,704	(c)	
Bond	56	186	48	197	44	205	(c)	
Management Information	88	1,229	98	1,397	81	1,483	(c)	
Credit(d)	1,028	4,485	1,038	4,587	1,109	5,698(e)	1,056	6,202

(a) The total figures are comprised of credit, personnel, and other reports.

(b) CX 43a is the source for 1970 figures; CX 47e, f, which has no figures for 1970, is the source for the 1965, 1967, and 1969 figures because the breakdown of the property category permits a reliable indication of the fire and casualty insurance reporting market. [11]

(c) CX 43a provides no adequate breakdown for these categories.

(d) The credit category includes mortgage reports.

(e) The 1969 and 1970 credit figures include $1,105,400 and $1,348,000, respectively, in credit card pick-up service revenue. (CX 43b) No indication has been made in the record regarding the amount of credit card pick-up service revenue in the 1965 and 1967 credit figures.

(CX 43a, b; CX 47e, f)

B. The Credit Bureau, Inc. of Georgia (CBI)

15. The Credit Bureau, Inc. of Georgia (hereinafter referred to as "CBI") is a corporation organized in the State of Georgia, with its principal place of business at 1600 Peachtree St., N.W., Atlanta, Georgia. It was incorporated on January 27, 1937. (CX 142a,h)

16. CBI's primary business is providing credit reports on consumers to credit grantors which need to evaluate the financial reputation and payment history of individuals in order to determine whether credit can safely be granted. CBI also produces personnel reports, which concern the subject's acceptability for employment. (CX 42a; CX 180, p. 28) In addition, it provides collection services and credit card promotions for credit grantors in the United States. Its credit grantor customers are primarily department stores, retailers, banks, and credit card companies. (White 11,693, 11,777–778)

17. CBI has grown substantially through acquisitions. It owned 22 credit bureaus at the end of 1959. Ninety-four acquisitions were made from 1960 through January 1971, with 81 of them made since the end of 1965. CBI owned 115 credit bureaus in the United States as of January 1971 in addition to 5 other bureaus in Canada. (CX 74a–d; CX 167f; CX 197f; CX 363z31a; see Appendix A for a listing of acquisitions)

18. CBI's credit bureau offices are located primarily in the

southeastern United States, the New York-New Jersey metropolitan area, the Washington, D.C. area, the San Francisco Bay area, and the Pacific Northwest. (CX 135; CX 142h, i; CX 167f) [12]

19. CBI is presently organized into eight regional automated credit reporting centers, located in Albany, New York; Atlanta, Georgia; Miami, Florida; Orlando, Florida; New Shrewsbury, New Jersey; Portland, Oregon; Washington, D.C.; and San Jose, California. The remainder of its credit reporting offices are manual credit bureaus. (White 11,152–154, 11,156–157; RX 280)

20. Revenues of CBI from reporting services, not including dues and promotions, amounted to the following:

CBI of Georgia

	1965	(000)	*1967*	(000)	*1969*	(000)	*1970**	(000)
	No.	*$*	*No.*	*$*	*No.*	*$*	*No.*	*$*
Total	2,959	3,501	3,993	4,722	6,089	8,479	5,931	8,259
Credit	2,954	3,480	3,986	4,694	6,078	8,429	5,921	8,210
Personnel	5	21	7	28	10	50	10	49

* Does not include sales of the Credit Bureau, Inc. of Washington, D.C., or Credit Bureaus, Inc. of Salem, Oregon.

(CX 42a)

C. Retailers Commercial Agency (RCA)

21. Retailers Commercial Agency, Inc. (hereinafter referred to as "RCA") is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business at 1600 Peachtree St., N.W., Atlanta, Georgia. It began business in New York City in January 1897, as a credit reporting agency. It was incorporated on July 13, 1934; in that same month, all the stock of RCA was purchased by RCC. (CX 123b; CX 142a, f)

22. RCA was acquired in order to supplant RCC in the credit reporting business and to find a less expensive way to produce better credit reports, primarily mortgage reports. (Rutherford 13,169–170, 13,487)

23. RCA operates well over 100 branch offices and sub-offices throughout the United States, including offices in Portland, Oregon; Sacramento, Oakland, San Jose, and San [13] Francisco, California; Seattle and Tacoma, Washington; and Washington, D.C. (CX 134z; CX 362e; CX 363z12; Complaint and Answer, par. 10)

24. RCA produces many types of reports, including character credit reports, mortgage reports, collection aid reports, employment and personnel reports, slow payer reports, tenant reports and income

reports. (RX 392; CX 310; Aitken 10,689–690, 10,723–724; Rutherford 12,953–956, 12,965–967, 13,005, 13,210–216, 13,632–636, 13,764–766) These reports produced by RCA are generally based on investigation of the subject, including interviews and reference checks. (Rutherford 3847–50, 13,134–135, 13,210–211)

25. RCC regards RCA as an operating unit of Retail Credit Company rather than an autonomous company. Retail Credit Company markets and sells most of the reports produced by RCA offices, but RCA does sell some credit reports to its own customers in particular local areas. (Rutherford 12,965, 13,050, 13,072–073)

26. According to officials of RCC and RCA, the primary business of RCA is the sale of investigative "character credit reported," primarily for mortgage loan purposes. (Aitken 10,692; Rutherford 13,134–135, 13,168, 13,027–028) These reports are narrative reports which emphasize the general character of the applicant (McGregor 5836, 5772; Laurens 1941, 1956), and contain more extensive information than the credit bureau report usually sold to a retail merchant. (Rutherford 13,056–057) They may contain file information secured from a credit bureau, or may have no trade information at all. (Laurens 1941; McGregor 5837, 5771–72; Griffeth 6841; Rutherford 13,027)

27. RCA will also provide special investigatory reports requested by its customers for specific purposes, at an hourly rate. (Rutherford 13,211–213)

28. RCA usually does not collect, or maintain files on, consumer pay habit information. (Devers 8356–57) Its reports are often derived from the information contained in a credit application, which is verified directly with sources, and from checks of public record information on file. (Laurens 1955; McGregor 5836–37; Rutherford 13,007, 13,414, 12,963, 13,367) The report would contain, in [14] addition to the identity and addresses of the applicant, information on residence of the applicant, type of job, length of time on the job, general character, and whether he owned his home or rented. (Rutherford 12,963)

29. RCA, however, regularly maintains files of the credit reports which it has made. The information contained in those reports can be used in the same manner as a credit bureau file, to provide prompt information without the need for a new investigation. (Aitken 10,889; Rutherford 13,151) RCA also keeps files of public record information, such as deaths, judgments and bankruptcies. (Laurens 1957; Rutherford 13,491) An RCC executive official testified that in 1969–1970 RCA would have file information on an individual

in only 5–15 percent of the cases in which information was sought. (Rutherford 13,008)

30. In general, RCA will prepare and sell a consumer credit report to a retail merchant on request, usually when a credit bureau report is unavailable or inadequate. Such a report is usually based on verification of the information contained in the credit application, checks with references and public record information, and sometimes a telephone interview with the applicant, and contains pay habit information. This type of credit report is more expensive than an in-file credit report. (Rutherford 13,007, 13,131, 13,367, 13,480–481, 13,719) In some areas RCC maintains "derogatory files" and markets them to local credit grantor customers, including retail merchants. (F. 32, 194, 208–09) And, in Los Angeles, California, RCA has regularly sold credit reports since May 1970. (F. 33)

31. In the 1960's some customers of RCA stopped using the so-called "character reports" prepared by RCA and began to rely more heavily on reports containing pay habit information of the kind produced by credit bureaus from file information. The primary reason for this development was that in-file reports are less expensive, and can be obtained much faster, than reports based on investigation. (McGregor 5770–73; Rutherford 12,965–966, 13,627–628) As a result, RCA offices in certain areas attempted, in the mid-1960's, to develop a file containing pay habit and trade information on consumers in those areas. (Rutherford 12,968) An attempt to establish a derogatory file in Portland, Oregon was eventually abandoned as a [15] failure (F. 194), while a simultaneous effort in Tacoma, Washington allowed RCA to become a substantial competitor of the local credit bureau. (F. 208–09) Merchants in Tacoma were still purchasing in-file trade information from RCA into the 1970's. (Loeb 1191–92)

32. In addition, in 1963 and 1964 the RCA office in Los Angeles, California attempted to build a credit bureau file containing essentially derogatory information. It obtained the cooperation of 15 collection agencies and copied legal information. The files from RCA offices in Long Beach, Santa Ana, Anaheim and San Bernadino, California were consolidated with those of the Los Angeles office. Credit grantors in the area were solicited for information about accounts which were being sent to collection agencies. According to an official of respondent, the RCA office did not attempt to get pay habit information from credit grantors, because it would have been unable to file all the information. The Los Angeles RCA office made sales of file information to credit grantors over a period of several years, but RCA ultimately decided that revenues were insufficient to

cover expenses, and gave up the effort to build and maintain the file in the Los Angeles area. (Rutherford 12,980–987, 13,354–355, 13,650)

33. In a second attempt to expand its file base in Los Angeles, RCA purchased the assets of the Credit Bureau of Greater Los Angeles in May 1970. That bureau was a specialized credit bureau which offered credit reports to finance companies, tire dealers, furniture stores, auto dealers, milk companies, and auto repair shops. Its files were combined with those of RCA's Los Angeles office. (Rutherford 12,996–998; CX 128) According to an official of respondent, no attempt was made to solicit credit information from other retail merchants in the Los Angeles area. (Rutherford 13,365) The same official of respondent also testified that, although the RCA office was not able to capture the share of the credit reporting market which was originally expected, the office has been consistently profitable. (Rutherford 12,998)

34. Also during the mid-1960's, RCA attempted, unsuccessfully, to induce retail merchants in Atlanta to purchase its reports. (Griffeth 6840–44) In San Francisco, however, the RCA office sold in-file and updated credit reports containing pay habit information in competition with a local credit bureau, primarily to mortgage lenders. (F. 143) [16]

35. RCA's estimated revenue from reports amounted to the following:

Retailers Commercial Agency

	1965 (000)		*1967* (000)		*1969* (000)		*1970* (000)	
	No.	*$*	*No.*	*$*	*No.*	*$*	*No.*	*$*
*Total**	1,703	4,725	1,292	4,195	1,412	4,315	1,311	4,290
Credit	1,645	4,528	1,257	3,720	1,210	3,542	998	3,279
Personnel	2	6	Unavailable		11	46	11	46

* The amounts for the categories listed do not provide the full amount of the total; the difference is comprised of circulation quality, firm, and other reports.

(CX 40a, b)

D. Credit Marketing Services, Inc. (CMS)

36. Credit Marketing Services, Inc. (hereinafter referred to as "CMS") was established in October 1970 as a wholly-owned subsidiary of CBI and began business about February 1971. (CX 188a; CX 197d; White 11,763–764)

37. CMS was designed as a marketing organization to provide services related to the extension and control of consumer credit for regional and national credit grantors. In so doing, CMS provided

brokered credit reports and credit card promotional services to these customers. (CX 197d; CX 370; CX 367b, c; White 11,763–764)

38. In a suit brought by Credit Bureau Reports, Inc. (CBR), CMS was prohibited for a period of three years from going forward with any new marketing plan or new expansion program whereby RCC or any of its subsidiaries would act as reseller or sales agent in the life and health and fire and casualty insurance reporting and the non-local credit reporting markets for the sale of credit reports prepared from the credit data of non-RCC-owned credit bureaus to non-local credit grantors. RCC was also prohibited from withdrawing any credit bureaus owned by it or its affiliates from membership in CBR for three years (and thus prohibiting [17] exclusive use by RCC-owned credit bureaus of the brokerage facilities of CMS). Judgment was rendered on December 30, 1971 (*Credit Bureau Reports, Inc.* v. *Retail Credit Co.*, 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973)).[2]

39. As of January 1, 1973, CMS discontinued all efforts to complete as a broker of credit reports to regional and national accounts. It remained in business solely to sell promotional services. (Rutherford 3827, 13,038–039, 13,320–321)

II. IDENTITY AND BUSINESS OF THE ACQUIRED FIRMS

A. Credit Bureaus, Inc. of Salem, Oregon (CB West Coast)

40. Credit Bureaus, Inc. of Salem, Oregon (hereinafter referred to as "CB West Coast"), originally organized as a sole proprietorship in 1933 by Francis W. Smith, was incorporated in the State of Oregon in 1940, with Mr. Smith as its sole stockholder. (CX 261m; CX 365a)

41. CB West Coast was engaged in the business of producing and selling credit reports and supplying debt collection and other credit services to credit grantors. (F. Smith 250, 254) It sold verbal and written in-file consumer credit reports, mortgage loan reports, trade clearance reports, and personnel reports to such customers as retail firms, banks, oil companies, and credit card firms. However, CB West Coast had only limited sales of mortgage loan reports and minimal sales of personnel reports in 1969. It did not sell insurance reports. CB West Coast also provided commercial credit reports, primarily on individual entrepreneurs and small firms. (F. Smith 254, 270–72, 338–39; CX 41a; CX 171e; CX 176e; CX 307; CX 364z44a, z45a) CB West Coast maintained over 8 million credit reporting files. (CX 119h) [18]

[2] Official notice was taken of this decision. See Tr. 3886–87.

42. By the time of its takeover by CBI in January 1970, CB West Coast owned and operated 43 credit bureaus in the States of California, Idaho, Oregon, and Washington, including San Francisco, which was the largest of the nation's computerized bureaus in 1970. (CX 197f) Some of these bureaus engaged only in collection activities. (Smith 251; CX 365a–e; CX 366d–e) Nearly all of CB West Coast's credit bureaus were members of Associated Credit Bureaus, Inc. (ACB), a national trade association of credit reporting agencies. (CX 365f)

43. Revenues from reports produced by CB West Coast amounted to the following figures:

CB West Coast

	1965 (000)		*1967* (000)		*1969* (000)		*1970* (000)	
	No.	*$*	*No.*	*$*	*No.*	*$*	*No.*	*$*
Total	837	1,867	2,450	2,960	3,239	4,355	2,495	4,041
Credit	837	1,867	2,450	2,958	3,238	4,353	2,497	4,037
Personnel	—	—	.2	1.7	.3	1.9	.6	4

(CX 41a, b; CX 47k, 1; CX 48c)

(1) Portland Operations

44. In 1968, CB West Coast opened an office on Halsey Street immediately outside the city limits of Portland, Oregon, after being located a short period of time within the Portland city limits. The Halsey Street office contained the credit files of the credit bureaus of Beaverton, Hillsboro, and Oregon City, Oregon, and Vancouver, Washington, which had been consolidated in 1967. Consumer credit reports from these consolidated files were sold in the four-county metropolitan Portland area, including Portland and the counties of Clackamus, Multnomah, and Washington in the State of Oregon and Clark in the State of Washington. (Smith 251, 274; Aitken 10,797–799; CX 80z35; CX 171h; CX 365b)

45. The four bureaus comprising the Halsey Street consolidated office held memberships in Associated Credit Bureaus (ACB), before and after the consolidation of files at Halsey Street. (Rutherford 13,584) [19]

46. The number of subscribers to the credit reporting services provided by the metropolitan Portland operations of CB West Coast increased from 595 in 1967 to 727 in 1969. These included banks, retail firms, finance companies, insurance companies, realtors, oil and national credit card companies, utilities, and medical organizations, among others. (CX 171e, i)

47. The Halsey Street office served as CB West Coast's test mode

for the computerization of credit reporting. The Halsey Street office's computerization was accomplished and computerized credit reports were sold during the period of late 1968 or early 1969. (Aitken 10,846, 10,852; CX 80z34–z35)

48. Revenues from reports produced by the Halsey Street office accounted for the following figures:

	1967 (000)		*1969* (000)		*1970* (000)	
	No.	*$*	*No.*	*$*	*No.*	*$*
Total	56	93	244	300	172	231
Credit	56	93	244	300	172	229
Personnel	0	0	.1	.4	.3	2

(CX 38w, x, z, z1, z2, z3; Tr. 182)

(2) San Francisco Bay Area Operations

49. During 1966 and 1967, CB West Coast acquired the Credit Bureau of San Francisco, Inc., the Credit Bureau of Santa Clara Valley, Inc. (San Jose), the Retailers Credit Association of San Francisco, and the Bureau of the Greater East Bay (Oakland). All of these corporations were merged into Credit Bureau Metro, Inc., of California during August 1967 (hereinafter referred to as "Credit Bureau Metro"). (CX 261f)

50. Prior to its acquisition by CB West Coast, the San Jose Credit Bureau (formally called the Credit Bureau of Santa Clara Valley) had begun efforts to computerize its operations. Those efforts were the forerunner of the ACROPAC system later perfected by CB West Coast and CBI. When the [20] San Jose Bureau was acquired, CB West Coast hired the man who had begun to develop a computerized credit reporting system and he continued his efforts under CB West Coast on what eventually became the ACROPAC system. (Rutherford 13,557)

51. The primary geographic area served by Credit Bureau Metro in 1969 included the five counties of San Francisco, San Mateo, Santa Clara, Alameda, and Marin. Francis Smith, former owner of CB West Coast, identified the area as extending from San Jose through Hayward, up through the town of Oakland, across the Bay, including San Francisco, and down the peninsula to San Jose, California. (Smith 264; CX 460; see also CX 176i)

52. Revenues from reports produced by Credit Bureau Metro were as follows:

	1967 (000)		1969 (000)		1970 (000)	
	No.	$	No.	$	No.	$
Total	1,583	1,837	1,711	2,308	1,508	2,445
Credit	1,583	1,835	1,711	2,307	1,508	2,444
Personnel	.2	2	.2	1	.2	1

(CX 38a; Tr. 182)

(3) Tacoma Area Operations

53. In 1969, the Credit Bureau of Tacoma (hereinafter referred to as "CB Tacoma") was a part of CB West Coast. (Smith 251) On January 2, 1970, RCC acquired CB Tacoma as one of the bureaus within the CB West Coast chain. (T. Smith 1037)

54. CB Tacoma sold credit reports to credit grantors in Tacoma and surrounding Pierce County, Washington and engaged in debt collection. It had about 425,000 credit reporting files in 1970. (F. Smith 1037, 1073; Geyer 448–49; CX 307f) CB Tacoma was a member of Associated Credit Bureaus, Inc. (CX 307g) [21]

55. For each of the calendar years 1967, 1969 and 1970, CB Tacoma's sales and revenues from credit reporting were as follows:

	1967 (000)		1969 (000)		1970 (000)	
	No.	$	No.	$	No.	$
Total	168	281	299	360	212	334
Credit	168	281	299	360	212	334
Personnel	0	0	0	0	0	0

(CX 38z9; CX 307g)

(4) Other Pacific Northwest Operations

56. CB West Coast also owned a number of credit bureaus located in various cities and towns in Oregon, Idaho and Washington. These bureaus generally sold credit reports, without competition, in the area surrounding the town in which they were located. (F. Smith 251–55, 262–64)

(5) Acquisition by Respondent

57. In 1967 CB West Coast was in the process of developing a computerized credit reporting system. It found itself in need of additional capital, and began to investigate the possibility of securing a loan or being acquired by another company. It approached respondent for that purpose, and negotiations began in the fall of 1967. (CX 365i)

58. Representatives of RCC visited CB West Coast in September 1967 and reported to RCC on the development of CB West Coast's ACROPAC system. (CX 274; CX 611) RCC's director of data processing, who went to Salem, Oregon to investigate the automated

credit reporting system, reported favorably on it, and suggested that RCC consider purchasing it. (CX 274) It does not appear that any attempt was made simply to purchase the system. In November 1967 RCC decided that it had doubts about the profitability of the ACROPAC system, and did not desire to invest in a loan or acquisition on the West Coast at that time. (RX 3) [22]

59. On December 12, 1967 Donald Rutherford, then the president of respondent's affiliated companies, advised Francis Smith that RCC had decided to reopen discussions which "hopefully will lead to eventual merger of our interests," probably through a substantial loan to CB West Coast followed by a merger of the two firms. (CX 412) Those negotiations were undertaken on the condition that RCC could make full evaluation of the financial, data processing and managerial aspects of CB West Coast's business before a decision was made on whether RCC would invest in the firm. (CX 365i)

60. Senior executives of RCC visited CB West Coast in January 1968. They examined the company's competitive situation, marketing position, employee morale and customer usage. Rutherford explained to RCC's Advisory Committee for Acquisitions that if the result of the visit indicated that it was desirable for RCC to make a loan to CB West Coast with provision for later acquiring all its stock, a financial audit would be made of CB West Coast. (CX 613a) Such an audit was conducted by Arthur Andersen & Co. in 1968. (CX 261)

61. In July 1968 an agreement in principle was reached between RCC and CB West Coast for the acquisition of CB West Coast by RCC. It was agreed that CB West Coast would transfer all of its outstanding stock to RCC in exchange for 100,000 shares of RCC common stock. Included in the agreement was a loan in the amount of $3,500,000 to be made by RCC to CB West Coast for working capital, payment of debts, and completion of the automation project. (CX 413) Smith approved the terms, but indicated that he would prefer an immediate sale of CB West Coast to RCC to an option to purchase at a later date. (CX 414)

62. The formal loan agreement between RCC and CB West Coast authorized loans to CB West Coast in the amount of $3,500,000, to be secured by the pledge of all CB West Coast stock. As further consideration for the loan, RCC received an option to acquire the stock of CB West Coast in exchange for 100,000 shares of RCC common stock, exercisable on or before January 21, 1971. (RX 237; RX 240) The agreement also provided that RCC would have access to CB West Coast's electronic data processing system. (RX 237u; RX 240z9) It was understood that CB West Coast alone retained the right to sell the automated system, but that RCC could adopt and use it

without further payment even if the option was not exercised. (RX 241a) Included [23] in the option agreement was a 5-year covenant not to compete affecting all 11 stockholders of CB West Coast and prohibiting them from participating in the business of credit reporting and collection service in any county in the States of California, Idaho, Oregon, or Washington, in which CB West Coast was engaged in credit bureau or collection service operations. (RX 240z13; CX 44e)

63. The resolution of the RCC Board of Directors which approved the agreement termed it a "Plan of Reorganization for the acquisition of all the capital stock" of CB West Coast, and made no mention of the automated reporting system. (CX 417)

64. In 1969 additional loans to CB West Coast in the amount of $375,000 and $500,000 were authorized. The last of these loans was made on the condition that if RCC exercised the option, any unpaid balance of the loan would reduce the number of shares of RCC stock which would be given in exchange for CB West Coast stock. (RX 322a; RX 324a) As of December 31, 1969, $4,275,000 was due to RCC under these arrangements. (CX 51, p. 14)

65. On December 16, 1969, an agreement and plan of reorganization among RCC, CB West Coast and CB West Coast's stockholders was entered into whereby CB West Coast's stock would be exchanged for 90,000 shares of RCC stock. The exchange was consummated on January 2, 1970. (RX 248; CX 197f)

66. The record does not support respondent's contention that its agreements with CB West Coast were motivated solely by a desire to obtain an automated credit reporting system for CBI. (RPF 56) Rather, the record supports the inference that the transaction was intended from its inception by both parties to culminate in an acquisition.

67. Rutherford estimated that CB West Coast's automated reporting system was worth $250,000 in 1968. (Rutherford 13,433). Trans Union Systems Corporation declined Francis Smith's offer to sell the system in 1969 for $500,000 because it thought it would be less expensive to develop its own automated system. (Devers 7443, 7473) However, RCC made loans to CB West Coast in excess of $4 million and gave its stock valued at $3.7 million in exchange for the stock of CB West Coast. (Briloff 15,455, 15,483) [24]

B. The Credit Bureau, Inc. of Washington, D.C. (CBDC)

68. Prior to its acquisition by RCC in October 1970, the Credit Bureau, Inc., of Washington, D.C. (hereinafter referred to as "CBDC"), was owned by approximately 25 shareholders. The four

principal shareholders were Woodward & Lothrop, Kann's Department Store, Lansburgh's Department Store, and the Hecht Company. The remaining stock was scattered among about 20 different companies and individuals. CBDC's subscribers numbered about 1000. (Waterbury 8365–66)

69. In October 1969, CBDC purchased Stone's Mercantile Agency ("Stone's"), its principal competitor in the sale of credit reports in the Washington, D.C. area, for $1,000,000. (Waterbury 8365, 8367–68; CX 7h) Stone's was a privately owned business engaged in producing and selling consumer credit reports, mortgage reports, business reports and personnel reports. (Tracey 1998–2000, 2014; Fletcher 2247–49) CBDC and Stone's continued to be operated as separate companies after the purchase. (CX 81b)

70. CBDC sold verbal and written in-file and updated consumer credit reports (including mortgage reports), business reports, employment reports, and real estate reports. (CX 527) Less than one-half of 1 percent of its reporting revenue came from the sale of personnel reports and less than 5 percent from the sale of mortgage reports. It did not produce or sell insurance reports during either 1967 or 1969. (White 11,659j; CX 73–f) The bureau also operated a Welcome Newcomer service, a loan exchange for small loan companies, a 7-store member shopping plate, and a Merchants' Mutual Protection service. (CX 81b)

71. At the time of the acquisition, CBDC and Stone's served the Washington trade area, which covered the District of Columbia, Montgomery and Prince George's Counties in Maryland, Arlington and Fairfax Counties in Virginia, and the cities of Alexandria and Falls Church in Virginia. There were no suburban credit bureaus. (Tracey 2003; Fletcher 2249; Holden 9128; CX 7g; CX 33z111; CX 81b) [25]

72. In 1969, both CBDC and Stone's were members of Associated Credit Bureaus. (White 12,111)

73. Revenues from reports produced by CBDC were as follows:

	1965 (000)		*1967* (000)		*1969* (000)		*1970* (000)	
	No.	*$*	*No.*	*$*	*No.*	*$*	*No.*	*$*
Total	1,309	1,318	1,446	1,446	1,980	2,167	1,407	1,729
Credit	1,306	1,305	1,435	1,422	1,978	2,158	1,405	1,719
Personnel	3	13	11	24	2	8	2	10

(CX 39c)

74. Revenues from consumer reports produced by Stone's amounted to the following:[3]

	1965	*1967*	*1969*	*1970*
Total	$1,070,000	1,181,000	1,188,000	1,134,000

(CX 39d)

75. In the late 1960's, CBDC established a Long Range Planning Committee to study the possibility of computerizing the credit bureau. As part of its initial activities, the Committee in 1968 had signed a tentative agreement, subject to cancellation, to purchase the Credipak automated credit reporting system software package then being developed by Associated Credit Bureaus, Inc. ("ACB"), the credit reporting industry's principal trade association. (Waterbury 8371–74, 8426–27, 8464; Holden 9099–9103, 9141–42; F. 126)

76. During 1969, the Committee studied various computer equipment proposals, and determined that it would cost at least $1 million to automate the credit bureau. This cost did not include the cost of developing a qualified [26] technical staff or of renting new office space large enough to house a major computer complex. (Waterbury 8373–77, 8381–82; Holden 9101–03, 9104–10, 9166–67) By the end of that year, the Board of Directors of CBDC decided to abandon any further efforts to computerize the credit bureau on its own, and formed a committee to explore the possibility of selling the credit bureau. The Executive Committee passed a resolution in December 1969 withholding the purchase of Credipak. (Waterbury 8446–50; Holden 9109–14; RX 304a)

77. CBDC's Executive Committee, after reviewing several offers, decided to sell the bureau to RCC. Accordingly, on October 29, 1970, CBDC was purchased by RCC for $3 million. Although the sale agreement did not contain any clause obligating RCC to computerize CBDC within any particular time frame, there was a "very definite understanding" on the part of the CBDC Board that CBI would automate the bureau, and it did so in February 1973. (Waterbury 8436; Holden 9169–73; White 11,578–579, 11585–586) RCC's subsidiary CBI became the owner of the bureau. (CX 7b)

C. Retail Credit Association of Portland, Oregon, Inc. (CB Portland)

78. The Retail Credit Association of Portland, Oregon, Inc. ("CB Portland") was incorporated in January 1921, as a membership

[3] Personnel reports could not be separately identified by Stone's.

corporation. In 1969, there were 973 member-stockholders, most of them Portland merchants, each of whom had an equal share in the ownership of the bureau. The member-stockholders represented practically all of the credit grantors in Portland and were the principal users of the credit bureau. (Huygens 5845–47; CX 170c–d)

79. CB Portland produced and sold various credit reports, including verbal and written in-file and updated reports and mortgage loan reports. It also sold personnel reports. About 3 percent of its revenues came from the sale of mortgage reports, and less than 1 percent from the sale of personnel reports. CB Portland did not produce or sell insurance reports. (CX 170b, g–h) [27]

80. CB Portland sold credit reports to banks, merchants and others operating within a four-county trade area–Washington, Multonomah and Clackamus Counties in Oregon and the southern part of Clark County in Washington. It maintained files on consumers residing in the same general area. (Laurens 1934, 1940; Winthrop 5613–18; Huygens 5862–63; CX 170i) As of the beginning of 1970, CB Portland maintained approximately one million credit files, none of which were computerized. (CX 170g) CB Portland was also a member of Associated Credit Bureaus, Inc. (Laurens 1944; CX 170b)

81. For each of the following calendar years, CB Portland's sales and revenues from credit reporting were as follows:

	1967 (000)		*1969* (000)	
	No.	*$*	*No.*	*$*
Total	468	608	436	656
Credit	467	604	435	652
Personnel	1	4	1	4

(CX 170b)

82. Starting in 1966, the Board of Directors of CB Portland began to study various methods of computerizing the credit bureau, but by 1970 had concluded that it could not afford to automate the bureau, either by itself or on a cooperative basis with other independent credit bureaus, and that it lacked the managerial capability to operate an automated credit bureau. (Winthrop 5627–28; Huygens 5869–71; RX 84)

83. In the spring of 1970, James Huygens, then president of CB Portland, contacted a representative of CB West Coast in Salem, Oregon, which had been acquired by respondent, to discuss and inspect CB West Coast's computerized credit reporting system. (Huygens 5883–84; Aitken 10,727, 10,842–843) After a series of meetings with respondent's representatives, the CB Portland Board recommended that the credit reporting assets of the bureau be sold

to respondent. (Winthrop 5627–31; Huygens 5885–86; Aitken 10,727–733; Rutherford 13,281–289) On January 2, [28] 1971, the bureau's credit reporting assets, including its credit files, equipment and fixtures, were sold to respondent for $65,000 in cash and a promissory note with principal and interest totalling $260,000, or a total purchase price of $325,000. The purchase agreement expressly provided that these assets cannot be sold to any other company without the consent of Retail Credit Association of Portland, which continues in existence as a merchants' trade association. (Rotenberg 5583; Winthrop 5630–31; Huygens 5852–54, 5888–89; Rutherford 13,121–122; CX 459)

III. THE CREDIT REPORTING INDUSTRY

84. The Retail Credit Company, with its subsidiaries, is engaged in the business of gathering and reporting information on individuals and on commercial organizations to businesses for credit, insurance, claim, employment and marketing purposes. (Rutherford 13,017–018; CX 117c; CX 167b–c; CX 363z20, z37a; CX 622b) Within this overall industry are a number of submarkets, which will be discussed below. Credit reporting is a separate line of service from other types of business reporting. (Rutherford 13,390–391; JX Rutherford Dep. 61)

A. Credit Reports

85. Credit reports on individuals are used by credit grantors for the purpose of making decisions regarding the extension, continuance or financial settlement of credit to those individuals. (CX 117a; CX 142h–i; Crowley 388; Brund 1102)

86. A credit grantor is a firm or individual which extends credit to its customers in the conduct of its business. Credit grantors include retail merchants, banks and other financial institutions, oil companies, travel and entertainment card companies ("T&E" companies), and professionals. (F. Smith 346–47; Kopriva 477; Spafford 8882–83)

87. Credit reports include in-file and updated consumer reports, mortgage reports, tenant reports, trade and employment reports and character reports. (Pinger 1270; Daussin 1367, 1497–98; Rutherford 13,503, 13,662, 13,669–72; CX 30; CX 64; CX 354e) [29]

88. Credit reports generally contain four basic types of information: identification of the subject (*e.g.*, name, address, and marital status), employment history, trade data and public record data (*e.g.*, judgments and bankruptcies). (Daussin 1367; 1497–98; Pinger 6920;

Spafford 8891-92) Credit reports sold by RCC, RCA and CBI contain this information. (CX 30, pp. 9, 13, 21, 24; CX 64h; RX 22; RX 227; RX 228)

89. Credit reports prepared by credit reporting agencies (see complaint par. 1(a)) are usually in-file (based on pay habit or trade and other information already in the files of the firm making the report) or updated reports (where data in the files of the credit reporting agency is further updated or verified by phone or mail at the time the report is made). (Daussin 1409; Tamalis 2726; Rutherford 3847-49; McGregor 5839; Jensen 6427; Chilton 8669-70; Sasser 9287) Reports may also be produced through verification of information contained in a credit application. (McGregor 5836-37; Rutherford 13,719)

90. Credit reports may also be based upon information developed by a credit investigatory agency. These reports focus more on the reputation and character of the applicant than on his credit history, and may be developed through field investigation, including personal interviews. (Daussin 1486-87, 1406; Laurens 1941, 1956; King 3360-61; Rutherford 13, 131) These investigative reports are more expensive than file reports, and require more highly trained and skilled personnel. (Rutherford 13,027, 13,131, 13,080-081) Credit bureaus generally do not engage in field investigation. (Spafford 8892; Sasser 9278)

91. Most credit bureaus sell in-file and updated reports, and will develop credit information on individuals on whom they do not already possess a file. (Julien 560; Daussin 1904; Tamalis 2727; Sasser 9277-78; Rutherford 13,367)

92. Mortgage reports are used to determine whether to make a mortgage loan to an applicant, and are sold to banks, mortgage companies, savings and loan institutions and real estate companies. (Gauss 635-36; Spafford 8891-95; Aitken 10,887-894) [30]

93. Mortgage reports are a type of credit report (Daussin 1498; Jensen 6427; Sasser 9277; Rutherford 13,186), and are produced and sold by credit bureaus. (Gauss 633; T. Smith 1004; Daussin 1496, 1498; Tamalis 2727; King 3360-61; Jensen 6427; Spafford 8895; Sasser 9277; Carey 9475; CX 47c)

94. Mortgage reports prepared by credit bureaus include the same types of information contained in other credit reports, including pay habit data, but are usually more extensive and detailed and include information on income and net worth. (Gauss 634-35; Kopriva 468-69; T. Smith 1005-06, 1047; Tracey 2007; King 3360-61; Jensen 6427-29; Spafford 8885)

95. Credit bureau mortgage reports are based upon information

contained in the credit bureau's files or on the credit application. That information, especially concerning trade accounts and employment, is updated and verified by mail or telephone, including in some cases a telephone conversation with the applicant. References may be contacted as well. (Kopriva 468–69; Daussin 1406; Tamalis 2726–27; King 3360–61; Jensen 6428–29; Chilton 8669–70; Sasser 9287)

96. Mortgage reports prepared by credit reporting agencies are not investigative reports. (Daussin 1406; Spafford 8894)

97. Mortgage reports are more expensive than other credit reports (F. Smith 357–58; Kopriva 469–71; Pinger 6904), are occasionally prepared by distinct employees of the credit bureau (Gauss 634; T. Smith 1046), and may be produced on a special form. (F. Smith 357–58; Kopriva 468–69; T. Smith 1046; Pinger 6904)

98. Credit bureaus compete with RCA in the sale of mortgage reports in a number of areas of the United States. (Homeda 2060; Devers 8356–57; F. 143)

99. Mortgage reports are also prepared by credit investigative agencies. These reports often involve extensive field investigation and are much more expensive than credit bureau mortgage reports. (F. Smith 265–66; King 3360–61) [31]

B. Credit Bureaus

100. Credit bureaus are engaged primarily in the business of selling in-file and updated credit reports. Credit bureaus collect information on the history of repayment of credit by individuals who reside in the service area of the bureau, store it in files, and sell it to credit grantors who use it to evaluate the credit worthiness of consumers to whom they may extend credit. A credit bureau must have a data base containing information on the individuals who reside in the community in which it is located. Some of the information is secured from public record sources; the remainder is acquired from credit grantors, who must be induced to provide it voluntarily. Information from credit grantors must be supplied on a regular basis so that the bureau can keep its files current and up to date. Thus, credit grantors are both suppliers of, and customers for, credit information maintained by credit bureaus. (Erichson 2082; Spafford 9812; White 11,618–621)

101. In order to qualify for membership in Associated Credit Bureaus, Inc., a national trade association, a bureau must maintain files on residents of the area within which it operates, secure the support and use of its services by a number of major and representative credit grantors in all lines of business, and acquire

trade information from a representative cross-section of credit grantors. (Spafford 9812–14; CX 552)

102. In order successfully to operate its business, a credit bureau must sell reports which are complete and accurate, current, promptly available, and reasonably priced. (Laurens 1952; Holden 9156)

103. Credit bureaus are represented by a national trade association, Associated Credit Bureaus, Inc. (ACB). (Kopriva 466, 497; Pinger 1272; Spafford 1586, 8912; CX 624) There is another trade association of credit bureaus known as International Credit Bureau Managers (ICBM). A credit bureau may be a member of both organizations. (Erichson 2235)

104. The precise number of credit bureaus operating in the United States is unknown. In 1970 there were approximately 2,100 credit bureau members of ACB, some of which [32] were under common ownership. In 1973 the number was approximately 2,000. (Spafford 1565) ACB membership grew from 1,893 in 1958 to 2,053 in 1972. (CX 213c) The number of non-ACB bureaus is undetermined. However, CBI had executed service agreements with 285 non-ACB member bureaus as of November 1970, and with 404 such bureaus by January 1974. (RX 282)

105. There has traditionally been only one credit bureau operating in each community. Many credit bureaus are owned by the merchants who use its services. These merchants, preferring to deal with a single source of credit information, have sometimes refused to cooperate with competing credit bureaus, either by purchasing their reports or supplying them with trade information. (See Fs. 190, 197) In January 1975, there were only 17 cities in the United States in which ACB recognized more than one credit bureau member. (CX 624)

C. Credit Report Brokerage Firms

106. In order to expedite and simplify the purchase of credit reports by large credit grantors with regional or national operations, credit report brokerage companies have developed in the credit reporting industry. The largest of these firms in 1970 was Credit Bureau Reports, Inc. (CBR), which has more than 2,000 local credit bureaus under contract. (Erichson 2069; White 11,757–759) Other brokerage firms include Credit Services International (CSI), a division of ACB, and Credit Marketing Services (CMS), a subsidiary of CBI, which was involved in brokering credit reports until January 1973. (Erichson 2082–83; Spafford 8861; White 11,759–764; Rutherford 13,035–039, 13,158–165; CX 547) The brokering procedure is

illustrated as follows. Credit grantors who have contracted with the broker obtain order tickets which they use to request credit reports directly from individual credit bureaus. The local credit bureau then mails the report directly to the credit grantor and periodically forwards the order tickets to the broker for redemption. The broker bills the credit grantor and receives a commission for its services. (Pinger 1227–31; Daussin 1368–70; Erichson 2190–92)

107. ACB, through its coupon system, provides a means for the interchange of credit reports and information among its members. Members buy coupons from the Association, and [33] can use them to pay for credit reports ordered from another member bureau. The bureau receiving the coupon can use it to order a report from another bureau, or can redeem it for cash. (Kopriva 470–74)

D. Point Scoring

108. Point scoring is a method sometimes used by credit grantors in making credit granting decisions. (T. Smith 1034–35; Daussin 1463; Spafford 8826) Credit grantors using a point scoring system can make credit decisions based upon scores derived from varying numerical values assigned to information presented upon a credit application, as determined by the scoring system used. Usually, those applicants who score above a certain point are automatically granted credit; those who score below a certain point are automatically denied credit. Credit reports are ordered on those who fall in the middle range. (T. Smith 1054–55; Brund 1171–72; DeBoer 5366–68; Golding 7110) A few companies rely almost exclusively on point scoring. (Rejmen 7041–44) Others use it only as a screening mechanism to determine which applicants will be rejected without further investigation. (Loeb 1208; Garcia 7167–68, 7247) Still others point score the information found in the credit report. (Huygens 5899–5900) In those instances where it is used, point scoring is generally used in conjunction with, and does not eliminate the need for, credit reports. (Day 776–77; Brund 1171–72; Loeb 1208; Daussin 1464–66; Tamalis 2467–68; DeBoer 5293; Garcia 7247; White 11,728) However, to the extent that point scoring is used in lieu of reports, it reduces the number of credit reports a credit grantor will purchase. (Brund 1141–42; Daussin 1476–79; DeBoer 5370–72, 5374–75; McGregor 5779; Carlson 7001; Rejman 7051; Golding 7120; White 11,731)

E. Trends in the Credit Reporting Industry

(1) Acquisitions

109. Since 1965 there has been a trend in the credit reporting

industry toward acquisitions of credit bureaus, primarily by a few large companies. (Erichson 2111–13; Spafford 8895–96; CX 168c) As a result, a number of [34] regional credit bureau chains emerged in the late 1960's and early 1970's.

110. In 1965, CBI owned 35 credit bureaus, located mainly in the southeastern part of the United States. CB West Coast owned about 32 bureaus, located mainly in the States of Oregon, Idaho and Washington. Chilton Corporation owned 30 credit bureaus, located mainly in the Southwest. Credit Data Corporation owned three bureaus in 1965; in Detroit, Michigan, San Francisco and Los Angeles, California. (F. 17; CX 38; CX 219d; CX 363z16; Gauss 574–75, 604–05)

111. From 1965 to 1969, CBI acquired 27 credit bureaus, including the Atlanta credit bureau and others in the Southeast, Northeast and New Jersey. In 1970, RCC acquired the entire CB West Coast chain of credit bureaus, which had itself expanded from about 32 bureaus to 43 bureaus during the period 1965–1969. In 1970, RCC also acquired CBDC and 10 other credit bureaus, and in January 1971, it acquired CB Portland. (F. 17, 42, 65, 77, 83; Appendix A)

112. Chilton Corporation ("Chilton") which became a publicly-owned corporation in 1968, acquired the credit bureaus in Boston, Massachusetts, New Orleans, Louisiana, and Denver, Colorado, among others, in 1969 and 1970. At the end of 1970, Chilton owned a total of 36 credit bureaus. (CX 219b, d; Chilton 8583, 8596; RX 13, p. 17) Chilton has not entered, except by an acquisition, an area not contiguous to one of its existing markets. It has a company policy against direct entry as a method of entering new markets. (Chilton 8596–98)

113. Credit Data Corporation, which became the TRW Credit Data Division ("TRW Credit Data") in 1969, entered directly into the New York, New York, San Diego, California, Syracuse, New York, Sacramento, California, and Chicago, Illinois areas by opening offices in those cities during the period 1967 to 1970. It also leased the credit files of a credit bureau in Buffalo and the Garden State Credit Bureau in New Jersey. (Gauss 577–78; Day 688, 699–700; Holly 6184, 6194–96)

114. Trans Union Systems Corporation ("Trans Union," formerly Union Tank Car Corp.) entered the credit bureau business in October 1968 by the acquisition of the Credit [35] Bureau of Cook County, Illinois. (Devers 6666–70) Since that time, Trans Union has acquired credit bureaus in St. Louis, Missouri, Philadelphia, Pennsylvania, Louisville, Kentucky, Trenton, New Jersey, Bucks County, Pennsylvania, New York, New York, Los Angeles, Califor-

nia and San Diego, California. The bureaus in Philadelphia, Louisville, New York and San Diego were merchant-owned. (Devers 6666–70, 6685, 6725, 6728, 6736, 6740, 6751–52, 7467, 7591)

115. Since its initial entry by acquisition in October 1968, Trans Union has not considered entering any credit reporting market directly without first acquiring the credit bureau located in the principal city in that market. It is Trans Union's view that direct entry into a new credit reporting market is not economically feasible. (Devers 6765–69, 7445–55, 7475–77)

116. Computing & Software Corporation (later Cordura Corporation) acquired Computer Credit Corporation in 1967, the Retail Merchants Credit Association of Los Angeles, California in 1969, the Credit Bureau of Western Orange County in October 1969, the Credit Bureau of Northern Orange County in December 1972, and offered to purchase the Credit Bureau of Pittsburgh, Pennsylvania. (Sasser 9182–84, 9198–99, 9230–32, 9288–90) Cordura Corporation's Los Angeles operations were acquired by Trans Union in 1974. (Devers 6740)

117. During 1972, Computing & Software considered entering directly into the marketing of consumer credit reports in northern California, but rejected this approach because there was "little probability of getting a decent return" on investment, since two automated credit bureaus were already in operation. (Sasser 9227–29)

118. Associated Credit Services, Inc. ("ACS"), formerly the Credit Bureau of Greater Houston, acquired credit bureaus in Corpus Christi, Galveston, Alice, and Texas City, Texas, during the period 1971–1973, and offered to purchase other bureaus as and when they became available for purchase. ACS never entered, or attempted to enter, a credit reporting market in direct competition with the credit bureau operating there during the period 1970–1974. (Pinger 1224, 1267, 1294–98) [36]

119. There are substantial barriers to entry into credit reporting. They include the need for support and cooperation of merchants and other credit grantors, adequate file information, experience in the credit reporting industry, sufficient capital, ability to offer competitive prices and services and, in certain markets, computer technology. (Crowley 413, 431; Kopriva 490–91; Gauss 604–06; Day 683; T. Smith 1051; Loeb 1200; Pinger 1260, 1297–1298; Laurens 1951–1952; Tracey 2018–19; Davis 5457, 5459; Huygens 5892–94; Holden 9123–27)

120. Competition between or among credit bureaus located in the same communities or metropolitan areas has resulted in improved service and lower cost to credit grantors. (F. Smith 348; Crowley 425–

26; Kopriva 496–97; Gauss 625; T. Smith 1035, 1042–43, 1077; Brund 1167–68) Competition is one factor taken into account by credit bureaus in determining their prices. (F. Smith 348; T. Smith 1077; Devers 8110) The possibility of new entry into a bureau's trade area has encouraged that bureau to improve its services and prices. (T. Smith 1010, 1035, 1048–49; Chilton 8502)

(2) The Development of Computerized Credit Reporting

121. The middle and late 1960's saw the development and increasing implementation of computerized credit reporting services by a number of firms in the credit reporting industry. Automation of credit reporting has accompanied the automation of accounts receivable files by large credit grantors, such as banks, finance companies, oil companies and large retail stores. (Spafford 8818; White 11,200, 11,202; CX 180, pp. 2, 6–9) Retail Credit, TRW Credit Data, Chilton, Trans Union and ACS have some portion of their credit reporting operation computerized at the present time. (Gauss 633; Daussin 1390; White 11,152–153) Other credit bureaus have computerized their credit reporting operations by means of automation service contracts. (F. 131–132)

122. Credit reports produced from computerized or automated files are a fast growing segment of the credit reporting industry. Sales of credit reports based on automated files have increased dramatically since 1970. [37] During 1971, the dollar volume of in-file and updated credit reports based on computerized files sold by credit bureaus owned and serviced by companies offering computerized credit reporting services, in the United States, was about $26.8 million. By the end of 1973, this dollar volume had risen to about $61.7 million, an increase of more than 100 percent in two years. (RX 376 *in camera*)

123. Computerization has generally resulted in improved speed of service, lower cost of service, and increased accuracy and currency of information, and has enabled bureaus to expand the geographic coverage of their data base. (T. Smith 1058–59; Brund 1151–52; Pinger 1305–06; Chilton 8502–04; Spafford 8818–22)

124. Development of a computerized credit reporting system was first undertaken in 1963–1964 by Hughes Dynamics in Los Angeles, California. Hughes Dynamics had acquired Consumer Credit Corporation and partially automated the bureau before being required to sell it back to its original owner. (Rutherford 13,417–418, 13,673) This development was followed in 1965 by the inception of an automated credit reporting system operated by Credit Data Corporation (CDC)

in the Los Angeles, California area. (Gauss 603–04; Jensen 6611; CX 455p; RX 10a)

125. By the end of 1967, CDC also operated computerized credit reporting offices in San Francisco, California and New York, New York. (CX 455p; Jensen 6471) Also in 1967, CB West Coast began computerization of its credit reporting services in the San Francisco area. (Aitken 10,850–852; Rutherford 13,266–271; CX 582)

126. ACB, in a joint venture with IBM, Chilton and ACS, begun in 1965, developed a computerized credit reporting system known as CB–360 or "Credipak," which was completed in April 1967 and offered to ACB members during the period 1968–1972. In 1968 the credit bureaus in Dallas and Houston, owned by Chilton and ACS respectively, adopted the system with some modifications and improvements. ACS also used its modified version of the system when it entered into a service contract to computerize the Credit Bureau of Kansas City. The Credit Bureau of Cook County used "Credipak" to begin automation of its files, but terminated its [38] use of the system when the bureau was acquired by Trans Union, which developed its own system. (Devers 6665–67; Pinger 6859, 6985–89; Chilton 8510–13; Spafford 8796–8804; White 11,201–203)

127. By the end of 1969, TRW Credit Data (which had acquired CDC) operated several additional computerized credit bureaus. Chilton and ACS operated computerized credit bureaus in Dallas and Houston, Texas, respectively. During this period, CB West Coast added computerized services in the area surrounding Portland, Oregon. (Gauss 650; Jensen 6471–72, 6603; CX 455m–p, s, u; RX 187; RX 192; Pinger 6859; Chilton 8496, 8627; Aitken 16,851–852; Rutherford 13,272)

128. In January 1967, CBI established an Automation Study Division. Its first step was to determine the economic feasibility of computerizing its largest bureau in terms of volume, Atlanta, with the system proposed for the CB–360 project. It was decided that CBI could not economically computerize its Atlanta bureau alone and that computerization of multiple bureaus on a single system was necessary to achieve efficiency. It was also decided that the CB–360 system could not fulfill CBI's needs, and that CBI would not use the Credipak system. (White 11,199–206, 11,211–213, 11,396–398, 11,423–426, 12,272–275, 12,841–844; CX 178; CX 179; CX 180; CX 181)

129. In respondent's view, an adequate computerized credit reporting system must have the capacity for multi-bureau or remote bureau hookups, use of multiple remote customer terminals, visual display or cathode ray tube (CRT) terminals, automated customer tape input and for a communications network to link remote

bureaus and customers to the central system. (White 11,211-219, 11,389-392, 12,350-353, 12,405-407; Rutherford 13,112; CX 178; CX 179; CX 180; CX 181)

130. In mid-1968 CBI gained access to ACROPAC, the automated credit reporting system being developed by CB West Coast. (F. 61-62) The ACROPAC system, as modified for use by CBI, was completed in July 1970, and CBI commenced installation of the system in Atlanta at that time. CBI's Miami and Orlando bureaus were computerized the next year. (White 11,434-440) [39]

131. The extent of credit bureau computerization was significantly enhanced in 1970 with the development of the computerization or automation service contract. A company with a developed and operational computerized credit reporting system (the "vendor") can contractually undertake, for a fee, to computerize an independent credit bureau through utilization of its software and hardware systems. This permits the contracting credit bureau to provide computerized credit reporting services to its customers without the necessity of developing its own proprietary computerized system. The first service contract was implemented between ACS and the Credit Bureau of Kansas City in 1970. (Pinger 6893-94, 6945; Chilton 8574-77; RX 92; RX 190; RX 202; RX 203)

132. Automation service contracts do not alter the management or operational characteristics of contracting credit bureaus. Bureaus under service contract generally retain control over prices of services, types of services and reports rendered, customers to which services are provided, sources of information, geographic file coverage and expansion and all other management responsibilities. Credit reporting files of the contract bureau are stored in segregated fashion in the memory components of the vendor's computerized system at the location of that system. Generally, these files are not accessible to others than the contract bureau except by separate agreement. Files of the contract bureau, as converted and maintained, remain the property of that bureau and are returned to the contract bureau upon expiration or termination of the service contract. Service contract terms are generally for a period of five years and contract bureaus are free to use other vendors at the expiration of such terms. (Pinger 1241, 6902-03, 6933-34, 6877-81, 6893-94, 6949-52; Devers 7349-55, 8341-43; Chilton 8574-77, 8579-80, 8658-62; Sasser 9257-58, 9299-9300; Holly 5986-88, 6162-63, 6171-75; Jensen 6527-28, 6546-48; White 12,463-468 12,468-472; RX 8; RX 92; RX 170; RX 181 *in camera;* RX 199; RX 202; RX 203; RX 205; RX 206; RX 217)

133. ACS initially provided computerization services pursuant to

service contract in 1970, TRW Credit Data in 1971, Cordura in 1971, Trans Union in 1971, Chilton in 1971, and CBI in 1972. (Jensen 6552–53, 6556–57; Pinger 6945; Devers 7357, 8025–26; Sasser 8313–16, 9199–9202; Chilton [40] 8536–37; White 12,444–447) These companies have competed with each other for service contracts and continue to do so except for Cordura. This competition provides manual credit bureaus with alternative sources for computer services, both at the inception of the initial service contract and at the expiration of original contract terms. (Jensen 6649z41–z42; Devers 6670–72, 7405–11 *in camera*, 7570–72, 7670; Pinger 6880, 6926–27, 6937–43; Chilton 8564–69, 8573; Spafford 8836–40; Sasser 9258–59; White 11,472–487, 11,490; RX 193)

134. Not all credit bureaus are amenable to computerization through service contracts. The level of reporting volume of the particular bureau and data transmission costs, a function of the distance of the bureau from the vendor system, as well as other factors, constitute limitations upon the ability of bureaus economically to computerize. These factors are variable with the result that economic prerequisites for a specific bureau may vary among vendors. In order to computerize by service contract, both the vendor and the contract bureau must have sufficient credit reporting volume to support the cost of the system and service. (Pinger 6877–81; Devers 7432–39, 8358; Chilton 8542–48, 8735–38; Sasser 9321–24, 9331–33, 9338–40; White 11,492–507, 12,465–471; RX 352a–b *in camera*)

IV. THE LOCAL CREDIT REPORTING MARKET

135. The local credit reporting markets in the San Francisco Bay, Washington, D.C., Portland, Oregon, and Tacoma, Washington areas are relevant submarkets for purposes of this proceeding.

136. Local credit reporting is the furnishing of credit information on residents of the community or metropolitan area served by a credit bureau or other credit reporting agency to credit grantors also located within the agency's trade or service area. (See Complaint Pars. 1(a), 8(a); F. Smith 254–55; Daussin 1428; Overholser 2910; King 3322–23; Jensen 6492–93)

137. Credit bureaus produce credit reports for sale in both their local credit reporting market and for sale to credit grantors located in other cities. The vast majority of the credit reporting business of a credit [41] bureau involves sales in its local credit reporting market. Various witnesses estimated the amount of their total credit reporting business accounted for by local credit reporting from 70–75 percent to as high as 95–98 percent. (F. Smith 263–65; Kopriva 501;

Day 715; T. Smith 1032; Pinger 6954; Devers 7650–51; see also CX 41; CX 42; CX 219; CX 481)

A. The San Francisco Bay Area Market

(1) Definition of the market

138. The relevant geographic market for credit reporting in the San Francisco Bay area encompasses the nine counties surrounding the Bay: San Francisco, San Mateo, Santa Clara, Alameda, Marin, Solano, Napa, Sonoma and Contra Costa. Credit Bureau Metro, the local bureau owned by CB West Coast, operated within this area in 1969, primarily in the counties of San Francisco, Santa Clara and Alameda. (F. Smith 264; CX 582; CX 585) Credit Bureau Metro's competitors identified these nine counties as the local credit reporting area. (Kopriva 489; Gauss 582–83, 585) Bay area credit grantors used Credit Bureau Metro and other credit bureaus located in these nine counties to obtain credit reports on residents of those counties. When reports were needed on residents of communities located outside the nine-county area, credit grantors used the credit bureaus located in those communities. (Crowley 395–97; Brund 1112–13; Davis 5482–88)

139. TRW Credit Data (formerly Credit Data Corporation) considered its primary service area in the San Francisco region in 1971 to be the counties of Santa Cruz, Santa Clara, San Mateo, Alameda, Contra Costa, San Francisco and Marin. (CX 384a) TRW Credit Data maintained a limited amount of file information on residents outside this area, but did not consider those areas a part of the Bay area market. It did not compete with local bureaus in those areas for sales of credit reports to local credit grantors. (Holly 6105–06) Mr. Gauss, marketing executive for TRW Credit Data, testified that its San Francisco marketing area in 1969 consisted of a toll-free area encompassing nine counties surrounding the Bay. (Gauss 582–83; see CX 582f) [42]

140. Respondent relies primarily on the hearsay testimony of two Retail Credit officials to support its position that the relevant market consisted of 12 counties in the San Francisco area, including the three additional counties of Santa Cruz, San Benito and Monterey. (Aitken 10,660–662; Rutherford 13,228; see also CX 176h–i) These two witnesses testified that Francis Smith, owner of CB West Coast, told them that the San Francisco bureau maintained credit data on residents of, and sold reports in, the 12-county area. However, these statements are inconsistent with the testimony given by Smith in this proceeding. (F. Smith 264) Moreover, the

relevant market cannot be defined solely by reference to the geographic scope of operations of the acquired company.

(2) Structure of the Market

141. In 1969 and 1970 the two leading competitors in the sale of credit reports in the San Francisco Bay area were Credit Bureau Metro and Credit Data Corporation (subsequently TRW Credit Data). (F. Smith 265; Crowley 388–89; Gauss 589, 595; Brund 1112–13, 1115–16) Other competitors in the market were a number of small credit bureaus operating in various communities within the Bay area. (Crowley 389, 397; Gauss 589, 595; Brund 1112–13; Davis 5532)

142. Retail Credit Company (RCC) and Retailers Commercial Agency (RCA) had offices located in the Bay area in 1969. RCC had branch offices in Oakland, San Francisco, San Jose, San Mateo, Vallejo, Hayward and Gilroy. RCA had branch offices in Oakland, San Jose and San Francisco, and an office or suboffice in Redwood City. (CX 36; CX 37, CX 125d; CX 134b; CX 136a; CX 363z12)

143. RCA sold some credit reports in competition with credit bureaus. It was not a strong competitor of credit bureaus in the sale of credit reports to retail merchants (Gauss 635–36; Brund 1139–40; Davis 5443–49, 5473, 5520), but it did sell updated consumer credit reports and was used by retail merchants as a secondary source of consumer credit information. (McGregor 5835–39; Rutherford 13, 230–231; CX 176k, 1) RCA advertised that it had extensive files on Bay area residents, and its San Francisco office had 400,000 files in 1970. [43] (Rutherford 13,529; CX 125c) RCA also competed with Credit Bureau Metro in the sale of mortgage reports. (Rutherford 13,230–231; CX 176k, 1) Mortgage lenders in the San Francisco area testified that they bought in-file and updated mortgage reports from Credit Bureau Metro and from RCA, using the latter as a secondary or supplementary source. These witnesses indicated that reports of both companies contained comparable information. (Nott 525, 533–40, 543–44; Julien 560–62, 556–58) RCA considered itself to be in competition with credit bureaus, particularly in the sale of reports to savings and loan and other lending institutions. (CX 344; CX 346; CX 347; CX 361r; CX 372a, b; CX 373d; CX 375b)

144. Complaint counsel introduced evidence which purports to show that Credit Bureau Metro accounted for 51 percent of local credit reporting sales in the Bay area market in 1969, Credit Data for 19 percent of sales, and RCA for 2.8 percent of sales in that market. (CPF 206) According to these figures, the four leading firms in the sale of local credit reports in 1969 accounted for 79 percent of the

market, the eight largest firms for 91 percent of the market, and RCA was the seventh largest competitor in the market. (CPF 207)

145. The evidence tendered by complaint counsel is inadequate to support their proposed findings as to the precise market shares of competitors in the San Francisco Bay area in 1969. CX 324, *in camera*, on which complaint counsel place primary reliance, lists total credit reporting sales for the credit bureaus operating in the area. The smaller bureaus were unable to provide estimates of their local sales only. Local reporting figures for those companies were developed by assuming that their local credit reports constituted the same percentage (90 percent) of their total sales as did local reporting sales of Credit Bureau Metro's total sales. (Note accompanying CPF 206) There is no record support for this assumption. Moreover, RCA is not included in CX 324, because it was not a part of the Section 6(b) reports on which CX 324 is based. RCA's local credit reporting sales were derived by applying to RCA's 1969 Bay area total sales (CX 37) that percentage of RCA's national total sales accounted for by local credit reports in 1969. (CX 40) (Notes accompanying CPF 205, 206) There is no basis in the record for concluding that this procedure [44] provided a reliable estimate of RCA's sales of local credit reports in the San Francisco Bay area. The evidence taken as a whole, however, shows that Credit Bureau Metro was the leading firm and, together with CDC, controlled a large share of the San Francisco local credit reporting market in 1969, that the market was a highly concentrated one, and that RCA made relatively insubstantial sales in that market. (F. 141, 143)

146. In 1969 and 1970 there were substantial barriers to entry into credit reporting in the San Francisco Bay area. These barriers included the need for cooperation of the retail merchants, sufficient credit file information, experience in credit reporting, sufficient capital, computer technology and competitive prices and services. (Crowley 412–13, 431; Kopriva 490–91; Brund 1160–61; Davis 5457, 5459)

147. Prior to Retail Credit's acquisition of Credit Bureau Metro, in January 1970, two firms had entered into credit reporting in the Bay area. CDC began competing in the sale of credit reports in the Bay area in 1962 when it opened an office and built what it called a central file of credit information obtained mainly from banks and finance companies. In 1966 it commenced the computerization of its San Francisco files. (Gauss 603–05, 620, 642, 663; RX 10a) CB West Coast entered the market in 1966 and 1967 by acquiring credit bureaus in San Francisco, San Jose and Oakland. Francis Smith,

owner of CB West Coast, consolidated and computerized the operations of these bureaus from 1967 through 1970. (F. 49, 125, 357)

148. Competition between the two computerized bureaus, Credit Bureau Metro and CDC, improved the quality of service, including speed of service and file coverage, and resulted in lower credit reporting costs to credit grantors in the Bay area. (Brund 1132–33, 1167–68; Davis 5513)

(3) Potential Competition

149. Respondent had the capabilities and resources needed to expand its credit bureau operations into new markets. [45]

150. Retail Credit Company, including the parent company and its subsidiaries, Retailers Commercial Agency and Credit Bureau, Inc. of Georgia, was the leading company in the sale of credit reports in the country in 1969 and 1970. (F. 147–150)

151. The estimated 1969 credit reporting sales of the 10 leading firms in the United States were as follows:

[See *In Camera* Findings]

152. The estimated credit reporting sales of the four leading firms in the United States in 1970 were as follows:

[See *In Camera* Findings]

153. If credit bureaus alone are considered, Retail Credit (through CBI) ranked second in total credit reporting sales in 1969, with $8.4 million, behind [See *In Camera* Findings]. (CX 321 *in camera*) In 1970, Retail Credit acquired CB West Coast and CBDC, which were the fourth and eighth largest firms in the industry, respectively, in 1969 (F. 151); their combined sales would make Retail Credit the largest firm in credit reporting sales by credit bureaus.

154. The 1970 credit reporting sales of the four leading credit bureau firms, including sales of CB West Coast and CBDC with those of CBI on a pro forma basis, were as follows:

[See *In Camera* Findings]

155. Retail Credit Company has been engaged in the production and sale of consumer credit reports since 1899. (F. 2) It acquired RCA in 1934 to expand its credit reporting services. By 1969, the company owned 61 credit bureaus. The firm having the second largest number of credit bureaus in 1969, CB West Coast, owned 43. (F. 17, 42; Appendix A)

156. In 1969, respondent provided nationwide credit reporting coverage through the offices of Retail Credit Company, RCA and CBI. RCC maintained 72 million files on individuals. (CX 364n–o) The company had approximately 1,700 office locations throughout the country that were capable of providing information on individuals. (F. 4) [46]

157. In January 1967 CBI established an automation study division which conducted numerous studies through 1969 regarding computerization of all or part of CBI. (White 11,119; CX 178; CX 179e; CX 180; CX 181; CX 361) CBI decided in 1967 to computerize the majority of its bureaus in the Southeast and in December 1967 it ordered a 360 Model 40 computer from IBM which was delivered in July of 1970. (White 11,403; CX 167g)

158. Respondent gained access to CB West Coast's computerized credit reporting system and the right to bring back to CBI the technical knowledge necessary to operate that system in August 1968, when the company made its initial loan to CB West Coast. (Aitken 10,926; White 11,414–415) CBI's computerization program was greatly accelerated by its working agreement with CB West Coast. (CX 167g) The computerized reporting system was installed by CBI in Atlanta, Georgia in July 1970. (White 11,442)

159. In 1967 Retail Credit began a long-range multimillion dollar investment program to maintain its leadership and increase its share of the credit reporting market. (CX 167j) The company held liquid reserves to finance major credit bureau acquisitions and used such funds for that purpose. (JX Rutherford Dep. 171–72, 197) Retail Credit had adequate capital to invest in building regional credit reporting centers. (CX 168c) The company's financial stability was recognized by credit grantors. (Waterbury 8400; Aitken 10,843)

160. The fact that San Francisco and the other markets at issue in this proceeding were distant from CBI's base of operations in the Southeast does not prevent respondent from being a potential competitor in those areas. Retail Credit is a company with nationwide operations. (F. 156) It was familiar with each of the marketing areas at issue in this proceeding for Retail Credit and RCA offices were already located there. (F. 142, 188, 205, 206, 216) Respondent had attempted through its RCA offices in the 1960's to enter into direct competition with credit bureaus in Tacoma, Washington, Portland, Oregon, and Los Angeles, California, and had acquired a credit bureau in Pomona, California in 1968. (F. 31, 32, 33; Appendix A) In addition, extension of a credit bureau firm's credit reporting operations to a point geographically distant from its [47] existing data bases is not an uncommon occurrence in the credit

reporting industry. For example, CDC made a direct entry into Los Angeles and San Francisco, California from its base of operations in Detroit, Michigan. (Gauss 575) TRW Credit Data subsequently entered a number of cities in other parts of the United States. (F. 163)

161. In some circumstances, credit reporting firms have entered local credit reporting markets directly.

162. Terry Smith, owner of the Seattle Credit Bureau, made direct entry into Everette, Washington in 1970 in competition with a Retail Credit-owned bureau. He was invited to do so by a group of credit grantors who were dissatisfied with the existing level of service and promised their cooperation to the new bureau. (T. Smith 1006–09, 1010–11, 1062–65; CX 164a)

163. Between 1962 and 1970, CDC (later TRW Credit Data) successfully entered directly into credit reporting in seven cities: San Diego, San Francisco, Los Angeles, and Sacramento, California, Chicago, Illinois and New York and Syracuse, New York. In San Diego and Syracuse, CDC competed against merchant-owned credit bureaus. (Gauss 575, 577–78; Day 688, 690, 692–93, 699–701; RX 13, p. 2) Since 1970, TRW Credit Data has made direct entry into a number of additional markets, including Las Vegas and Reno, Nevada, Baltimore, Maryland and Rochester, New York. In Rochester, TRW Credit Data competes with a merchant-owned credit bureau. (Day 689–90, 692; Jensen 6553, 6558)

164. CDC's entry into new markets was aided by its early development of a computerized credit reporting system and its ability to satisfy the needs of credit grantors. It entered the New York City market, for example, when it was invited by a Bank Interchange in 1967 to submit a bid to replace the Interchange's existing manual file with a central automated file. (Jensen 6266–69, 6649z12–z14; RX 102; RX 123b)

165. CDC's entry into San Francisco in 1962 was facilitated by a need on the part of banks in California for a central file to trace the credit history of applicants for credit. CDC was able to satisfy that need by creation of a central file containing credit information from banks and finance companies. (Gauss 603–06, 619–21) [48] In 1965 CDC expanded the central file concept to Los Angeles, using magnetic tapes of credit transactions as the basis of the file. (Gauss 576, 603–05) Entry into Los Angeles was aided by an agreement with the Bank of America for statewide information. (Gauss 603, 621) CDC also purchased a copy of the files of the Los Angeles Retail Merchants Credit Association in 1968. (Jensen 6269–71; Sasser 9181–82, 9193–97; RX 105)

166. An attempt by CDC to enter the Chicago market in the mid-1960's terminated because it did not receive the support of area credit grantors and its volume of sales was insufficient. In 1970, after the merchant-owned Credit Bureau of Cook County was bought by Trans Union, CDC again entered the Chicago market. (Jensen 6610–15) The failure of CDC's first attempt was attributed by the president of Trans Union to three factors: that CDC was at the time a relatively unknown company, its automated credit reporting system was not well developed at that point, and the merchants who owned the local bureau would not cooperate with a new entrant (Devers 7335–36)

167. CDC sustained business losses during the period in which it was entering new credit reporting markets and automating its credit reporting facilities.

168. CDC's total net investment in its operations during the years 1964–1968, in which it entered the San Francisco, Los Angeles, San Diego and New York markets, was approximately $6.8 million. (RX 120 1–m; RX 124c)

169. CDC's San Francisco offices sustained losses during the fiscal years ending January 31, 1966 and January 31, 1967. (RX 122; RX 123c)

170. From April 1968 to November 1969, CDC incurred approximately $11 million in losses. (RX 96z6; Jensen 6470–74) Part of that loss was due to CDC's charge card authorization program, which was unrelated to credit reporting (Jensen 6473–74); part is attributable to the cost of conversion from manual to automated credit files in a number of markets. (Jensen 6471–73) File conversion costs are not costs of direct entry, but would also be incurred by a company entering a new market through acquisition of a manual credit bureau (see White 11,384–386). [49]

171. In November 1969, TRW acquired all the stock of CDC. (RX 96; RX 135; see RX 126; Jensen 6457–58, 6466–67)

172. TRW Credit Data suffered a loss in 1969 and 1970. (RX 125a–b *in camera*) It expected its investment in CDC to become profitable in the future (RX 15, p. 30; RX 96z6) and TRW Credit Data was profitable in 1974. (RX 125a *in camera*)

173. In the mid to late 1960's, respondent considered credit reporting to be a growth industry. (CX 167e; CX 197d) It foresaw the impact of computerization on the credit reporting industry, and desired to maintain its position and to expand its share of the market in that industry. (CX 167j; CX 168a, c)

174. Respondent believed that the future of the industry lay in the creation of a regional complex of computerized credit reporting

centers, and desired to have as many regional centers as possible. Retail Credit saw itself in a "race" with its competitors to establish themselves in as many regions as possible. (White 12,363; Rutherford 13,449–450; JX Rutherford Dep. 211)

175. Respondent believed that it was one of a limited number of firms with sufficient capital to build successful regional centers, and thought it could achieve a controlling position in the Northeast and Southeast regions of the United States. (Rutherford 3773–74; CX 168c)

176. Respondent viewed the acquisition of CB West Coast as an extension of the company's credit reporting business into the Pacific Northwest. This extension of services was a consideration in determining whether to acquire CB West Coast and was recognized as an advantage of making the acquisition. (White 12,362; Rutherford 13,570–572, 13,576–577; CX 158b) The company was also aware that the acquisition of CB West Coast would be a significant step towards a regional network and a nationwide system of credit bureaus. (CX 156e; CX 158b)

177. Complaint counsel adduced no reliable evidence which indicates that respondent had special incentives to enter de novo into credit reporting markets on the West Coast, or an interest in doing so, prior to its acquisition of CB West Coast. [50]

178. A firm seeking successfully to enter the San Francisco area credit reporting market would require computer reporting facilities and the cooperation of a substantial number of area credit grantors. (Kopriva 431, 490–91, 499–500; Gauss 605–06, 623–24; Davis 5457–61, 5541)

179. It would have been extremely difficult for a third computerized credit bureau to have entered the market in the San Francisco Bay area in 1969, either de novo or by expansion of existing manual facilities. Two automated credit bureaus, Credit Bureau Metro and CDC, were already operating in the market. (Kopriva 490–93, 499–500; Brund 1161–64; Davis 5457–61, 5505–08, 5524–27, 5539–41) It is unlikely that the Bay area credit grantors would have supported a third automated file. (Brund 1162–63; Davis 5460–61, 5507–08, 5525–27, 5539–41; Sasser 9229) Credit grantors indicated that while they would consider utilizing a new firm which offered significantly lower prices than the existing firms or unique services, a firm which merely duplicated existing services would not succeed. (Guass 625–27; Brund 1175; Davis 5507, 5512)

180. RCC did not have a fully developed computer reporting capability in 1969. In 1968 RCC gained access to CB West Coast's computerized credit reporting system, labeled ACROPAC, and the

right to bring to CBI the technical knowledge to operate the system. In the fall of that year, CBI personnel were sent to Salem, Oregon to study the system and to determine whether any changes were necessary to fit the system to the needs of CBI. In late 1968 it was thought that the system would be completed to fit CBI's specifications in a short time, and in July 1969 the company considered offering to sell the system to the Boston Credit Bureau. However, the ACROPAC system was not installed in Atlanta until July 1970, though conversion of the Atlanta files began in January 1970. (White 11,421-422, 11,491, 11,431-438, 11,440-443, 12,425, 12,456; CX 629a)

181. Respondent was a potential entrant into the San Francisco Bay area credit reporting market in 1969-1970. However, the record as a whole does not support a conclusion that respondent was a likely potential entrant into the San Francisco Bay market in 1969-1970. [51]

182. Several witnesses identified respondent as one of a number of firms which was capable of entering the San Francisco Bay area credit reporting market in 1969-1970. (Kopriva 492-93; Gauss 607, 613; Brund 1128; see CPF 210) Also identified were TRW Credit Data (Gauss 607), Cordura (Gauss 607), Chilton (Gauss 607; Kopriva 493; Brund 1128), Trans Union (Gauss 607; Davis 5496-97), ACS (Kopriva 493) and Computing & Software (Brund 1128). However, no witness testified that RCC was perceived as a potential entrant in 1969-1970.

183. Respondent was not a perceived potential entrant in the San Francisco Bay area credit reporting market in 1969-1970.

(4) Effects of the Acquisition

184. The record does not support the conclusion that RCC offices in the San Francisco Bay area engaged in significant competition in the local credit reporting market with Credit Bureau Metro, the acquired firm.

185. Competition between RCA and Credit Bureau Metro was eliminated in the San Francisco local credit reporting market as a result of the acquisition of Credit Bureau Metro by Retail Credit. (F. 143) However, the record reflects that RCA's share of the relevant market was very small. (F. 145) Moreover, the competition revealed by this record was largely restricted to the sale of mortgage reports (F. 143), and mortgage reports constituted only a small portion of Credit Bureau Metro's business. (CX 176g) In these circumstances, the acquisition is not deemed to have resulted in elimination of substantial competition in the relevant market.

186. The acquisition of Credit Bureau Metro did not substantially

lessen competition in the relevant market by eliminating respondent as a likely potential entrant. (F. 181)

B. The Portland, Oregon Market

(1) Definition of the Market

187. The relevant geographic market for local credit reporting in the Portland, Oregon area at the time of the acquisition of Credit Bureau Metro, Portland ("CB Metro, [52] Portland," the local CB West Coast bureau) and the Retail Credit Association of Portland, Oregon, Inc. ("CB Portland") included the city of Portland and Washington, Multnomah and Clackamas Counties in Oregon and Clark County in Washington. Portland area credit grantors identified those four counties as their marketing area (Loeb 1194; Laurens 1934; Winthrop 5613; see Rutherford 13,314), and they bought credit reports on residents within that area from CX Portland and from the smaller bureaus located in the four-county area. (Loeb 1194; Laurens 1940; Winthrop 5613–17; Huygens 5862–63; CB 170i) CB Metro, Portland had an office just outside the Portland city limits (the Halsey Street office) in which files from four bureaus located in the nearby towns of Oregon City, Hillsboro, Beaverton and Vancouver, had been consolidated. (Rutherford 13,114) The bulk of its files were on residents of those areas (Smith 333–34; Laurens 1991–92; Winthrop 5617), but it did have files on residents of Portland and the entire surrounding area, and it solicited credit grantors throughout the Portland area. (Laurens 1948; Winthrop 5618–19; CX 171h)

(2) Structure of the Market

188. The only firms producing and selling local credit reports in the Portland market area in 1969 were CB Portland, CB Metro, Portland and RCA. (CX 170k–m; Loeb 1194; Laurens 1940–41) RCC had a branch office in Portland (CX 136e) but there is no evidence that it sold a significant number of consumer credit reports in the local reporting market.

189. RCA did not compete in a significant manner with credit bureaus in the Portland market in 1969. It sold some mortgage reports in addition to insurance reports, but it did not sell credit reports to retail merchants. (F. Smith 338; Loeb 1203; Laurens 1940–43, 1955–58, 1982–83, 1985–87; Rotenberg 5548–49; Winthrop 5620, 5688–89; Huygens 5864–65) CB Portland and CB Metro, Portland sold only a small number of mortgage reports. (CX 170h, CX 171g)

190. Prior to its acquisition by RCC, CB Metro, Portland was the only substantial competitor of CB Portland in the Portland area

credit reporting market. (CX 170k–l) Both bureaus operated in the same geographic area (CX 170i; CX 171h) and maintained overlapping files on some consumers. [53] (Critten 10,742, 10,919–920) Major Portland credit grantors, all of whom were members of CB Portland, testified that they purchased credit reports on residents of the four-county Portland trade area only from CB Portland and not from CB Metro (Loeb 1194; Laurens 1940, 1946; Rotenberg 5548–50; Winthrop 5613; Huygens 5862–64), and that CB Metro did not compete with CB Portland. (Rotenberg 5552–58; Huygens 5860–61) However, CB Metro did sell credit reports on residents of the four-county area, particularly the suburban areas (CX 171h; F. Smith 274; Winthrop 5615, 5617) and it could be used by credit grantors as an alternative source of credit reports on residents of those areas. (Rotenberg 5551–52) CB Metro also attempted, after it failed in its efforts to purchase the Portland bureau, to expand its operations in the city of Portland. (F. Smith 273–74; Lauren 1948, 1963; Winthrop 5618–19) It did not make substantial inroads into CB Portland's business because it failed to win the cooperation of Portland's major credit grantors (F. Smith 273–74; Loeb 1212, 1216; Laurens 1964) and some considered its reports to be inadequate. (Loeb 1216–17; Laurens 1946; Winthrop 5618–19)

191. In 1969 CB Portland accounted for approximately 71.6 percent of identifiable local credit reporting sales in the Portland market; CB Metro, Portland accounted for the remaining 28.4 percent of sales. (CX 332)[4]

192. The Portland local credit reporting market was a highly concentrated one. (F. 191) [54]

193. Significant barriers to entry into the local credit reporting market existed in the Portland, Oregon market in 1969. A company attempting to enter would have needed to know the credit reporting business, to have credit grantor cooperation, to be stable financially, have substantial amount of capital, and be competitive by maintaining accurate file coverage, adequate speed of service, and reasonable prices. (Laurens 1951–52; Winthrop 5675–76; Huygens 5892)

[4] Complaint counsel's proposed findings allotted to CB Portland 71.8 percent of sales in the relevant market; 27.4 percent to CB Metro, Portland; and 0.8 percent to RCA. (CPF 228) These figures have two serious defects. First, precise credit reporting sales figures for RCA were not available, and their sales were estimated by applying to total sales of the Portland office, the percentage of national sales of RCA accounted for by local credit reports. This procedure cannot provide a reliable estimate of sales in the Portland market. See F. 145. Second, in CPF 228, unlike CX 332, complaint counsel included in local reporting sales, interbureau sales made by the use of ACB coupons. This was done on the theory that the bulk of ACB coupon sales consist of antecedent reports, and that antecedent reports are local reports. (Note accompanying CPF 258) An antecedent report is one prepared by a bureau on a former resident of the community in which the bureau is located for use by a bureau located in the consumer's new place of residence. One witness testified that antecedent reports are not "nonlocal" reports. (Daussin 1453–54) However, antecedent reports do not conform to the definition of local reports found in Paragraph 8(a) of the complaint in this matter, and therefore may not be included in the local market.

(3) Potential Competition

194. In the early 1960's RCA attempted to enter into direct competition with the credit bureaus in Portland. It set up a derogatory file which it hoped would contain information useful to credit grantors but which was not found in the files of the Portland credit bureau. The file was built by obtaining collection accounts from the leading collection agencies in the Portland area, copying public records for the preceding 5-year period, including bankruptcies, judgments and tax liens, and securing from several merchants lists of accounts which had been discharged. Respondent's officials testified that this approach was taken because most Portland merchants refused to give RCA positive trade information. Many credit grantors in the Portland area were solicited by mail to subscribe to the RCA service; no attempt was made to solicit the major Portland merchants who owned CB Portland, because of a belief that such an undertaking would be futile. A charge of $1 was made for each report, [55] and no charge was assessed if no file existed. (Rutherford 3754–55, 12,968–970, 13,358–360; CX 131; CX 138; CX 139) RCA advertised that it had information on 250,000 Portland residents. (CX 113b) However, an RCC official testified that the file was not profitable because it was not adequately used, and the effort was abandoned after approximately two years. (Rutherford 3757–59, 12,969) No evidence was presented which suggests that RCA continued to sell this kind of derogatory report in 1969 or 1970.

195. Respondent had the capabilities needed to enter into new credit reporting markets, and it was interested in expanding its credit bureau operations. (F. 149–160, 173–175) However, there is no evidence that in 1969 or 1970 respondent had any special incentives to enter the local credit reporting market in Portland, or that it was interested in doing so.

196. I would have been extremely difficult for a company to have entered the Portland local credit reporting market in 1969 or 1970 in competition with CB Portland. (Laurens 1976; Huygens 5894) Credit grantor witnesses, all of whom were members of CB Portland, testified that CB Portland satisfied their need for credit information, and that they would not have cooperated with another credit bureau. (Laurens 1963, 1951–55; Huygens 5894) CB Portland had credit information from all the major merchants in Portland, and the merchants testified that they would rather deal with one central source of credit information than with two competing bureaus. (Loeb 1209–10; Laurens 1968–71; Winthrop 5697, 5703–04; Huygens 5892–93)

197. In the late 1960's, Francis Smith had attempted to increase his share of the credit reporting business in the Portland market, and was largely unsuccessful in getting Portland merchants to give him credit information or to purchase his reports. (F. Smith 273–74; Loeb 1202; Laurens 1963–65) Those merchants who did purchase his reports found them unsatisfactory largely because his files were insufficient, lacking information from the major credit grantors in Portland. (Loeb 1216–17)

198. Respondent was not a likely potential entrant into the Portland local credit reporting market in 1969 or 1970. [56]

199. There is no evidence in the record that RCC was perceived to be a potential entrant in the local credit reporting market in Portland in 1969 or 1970 by credit bureaus or credit grantors operating in that market.

(4) Effects of the Acquisitions

200. As the result of its acquisitions of Credit Bureau Metro, Portland on January 2, 1970, and CB Portland on January 6, 1971, Retail Credit Company accounted for 100 percent of the identifiable sales in the local credit reporting market in Portland. (F. 188, 191)

201. There is no evidence in the record that the acquisition of CB Metro, Portland eliminated substantial actual competition in the relevant market between respondent and the acquired bureau.

202. The record does not support a conclusion that respondent's acquisitions of CB Metro, Portland and CB Portland substantially impaired competition in the relevant market by eliminating respondent as a likely potential entrant into that market.

203. The record as a whole shows that respondent's acquisition of CB Portland eliminated substantial actual competition which had existed between CB Metro, Portland and CB Portland. (F. 190)

C. The Tacoma, Washington Market

(1) Definition of the Market

204. The relevant geographic market for local credit reporting in the Tacoma, Washington area at the time of the acquisition of CB West Coast was Pierce County, Washington, which includes the city of Tacoma. Both suppliers and buyers of credit reports perceived this area to be the relevant geographic market. (Geyer 448–49; T. Smith 1037, 1073; McLeod 1322–23; CX 307h) [57]

(2) Structure of the Market

205. The firms producing and selling local credit reports in the Tacoma market in 1969 and 1970 were the Credit Bureau of Tacoma (CB Tacoma), owned by CB West Coast, and RCA. (Geyer 450; F. Smith 251, 338; McLeod 1323—24)

206. RCC had an office in Tacoma (CX 136f), but there is no evidence that RCC sold a significant number of local credit reports in the Tacoma market in 1969 or 1970.

207. In 1969 and 1970, RCA was the only substantial competitor of CB Tacoma in the sale of local credit reports. Credit grantors testified that they bought verbal in-file credit reports from both RCA and from CB Tacoma, and that both reports contained substantially the same information and served the same purposes. (Geyer 450-454, 457; Loeb 1190-92; McLeod 1324, 1326-29) One credit grantor bought approximately one-half of his credit reports from RCA in 1969 and 1970; another purchased 10 percent of his reports from RCA during those years. (Geyer 457-58; McLeod 1330)

208. RCA became a substantial competitor in the Tacoma credit reporting market in 1963 and 1964 when it set up the Tacoma Derogatory Exchange in its office in that city. The Exchange was a file of derogatory information on consumers, such as bankruptcies and judgments. RCA set up the Exchange in an attempt to acquire a larger share of the consumer credit reporting market at the expense of the local credit bureau, which was believed to have had alienated a large number of credit grantors because it had raised prices and its service was poor. (CX 619) The RCA file was compiled from information secured from the leading collection agencies in Tacoma and by copying legal information for the previous five years. RCA was also able to acquire credit information on personnel stationed at the two military bases in the Tacoma area. RCA intended to add positive trade information to the file as it was used and some credit grantors were solicited to supply trade information to the file. The RCA file was widely advertised among Tacoma credit grantors, with a claim that it contained files on 200,000 (CX 93a) to 250,000 (CX 101c) area consumers. Reports were sold at a low price and no charge was made if no file existed. (Rutherford 12,971—973, 12,975, 3758—60, 13,352—354, 13,649) [58]

209. Donald Rutherford, an executive of RCC, testified that the file was a failure, being more expensive to maintain than it brought in revenues, and that the experiment was abandoned after a few years. (Rutherford 12,974, 12,987; see RX 334) However, it is clear from the record that Tacoma credit grantors continued to use RCA

as a source of consumer credit reports in 1969 and 1970. (F. 207) One Tacoma retailer, for example, switched his business to RCA in 1969 because he felt that the price CB Tacoma was charging for credit reports was too high. (Loeb 1191) Derogatory reports appear to be essentially an abbreviated form of credit report (see CX 461), and RCA's file contained enough trade information in addition to derogatory information to make it useful to credit grantors. (Loeb 1191) RCA continued to have good contacts with the military bases in the areas around Tacoma, and some credit grantors used it to verify rank and employment of military personnel stationed at those bases. (Winthrop 5692) RCA also tended to have more current file information than did CB Tacoma, and was therefore more likely to have information on military personnel. (McLeod 1338, 1342–43) The record refutes respondent's contention that RCA was used exclusively for information on military personnel. Rather, credit grantors tended to use RCA whenever more current information was desired, and as an alternative source of credit reports when a report from CB Tacoma was incomplete. (Geyer 450–51, 454–55; McLeod 1330, 1333; Winthrop 5708–09)

210. The RCA office in Tacoma had total sales of $66,428 in 1969. (CX 37) Applying to this figure the percentage of RCA's national total sales accounted for by local credit reports in that year (see F. 145), complaint counsel estimated RCA's 1969 sales of local credit reports in Tacoma to be $32,683, accounting for 10.7 percent of sales in the relevant market. CB Tacoma's sales of $273,640 would make up the remaining 89.3 percent of local credit reporting sales. (CPF 237)[5] [59] This method of computation cannot give a reliable estimate of RCA's actual sales of local reports in Tacoma in 1969. (F. 145) However, the record as a whole does support the inference that RCA sales comprised at least 10 percent of total sales made in the relevant market. (F. 207, 209)

(3) Effects of the Acquisition

211. After the acquisition of CB Tacoma by respondent, Retail Credit Company accounted for all of identifiable sales in the Tacoma local credit reporting market. (F. 205, 210)

212. There is no evidence that the acquisition of CB Tacoma eliminated substantial actual competition between that bureau and the RCC office in Tacoma.

213. Substantial actual competition between RCA and CB Tacoma in the sale of local credit reports in the Tacoma market was

[5] The figures proposed by complaint counsel in CPF 237 have been modified to reflect the elimination of CB Tacoma's interbureau sales from the class of local reports. (See F. 191 n.)

eliminated as a result of the acquisition of CB Tacoma by respondent. (F. 207)

D. The Washington, D.C. Metropolitan Area Market

(1) Definition of the Market

214. The relevant geographic market for local credit reporting in the Washington, D.C. area in 1970 included the District of Columbia, Montgomery and Prince George's Counties in Maryland, Arlington and Fairfax Counties in Virginia, and the cities of Alexandria and Falls Church in Virginia. Both suppliers and buyers of credit reports recognized this area as the relevant geographic market. (CX 7g; CX 33z111; CX 406b; Tracey 2003; Fletcher 2249; Waterbury 8408; Holden 9132–33)

(2) Structure of the Market

215. The primary firms producing and selling local credit reports in the Washington, D.C. market in 1969 were CBDC and Stone's Mercantile Agency (Stone's). Dun & Bradstreet produced and sold commercial credit reports almost exclusively and Hooper-Holmes did not sell in the [60] local credit reporting market. (Tracey 2005–06, 2012; Homeda 2049–50; Fletcher 2253–54)

216. RCC and RCA had offices in the Washington, D.C. market in 1969 and 1970; both had offices in the District of Columbia while RCC also had offices in Silver Spring and Suitland, Maryland and Alexandria, Virginia. (CX 134c; CX 136b, c, f; Complaint and Answer, Par. 11)

217. There is no evidence that the RCC offices in the Washington area sold a significant number of credit reports in competition with CBDC or Stone's.

218. The record as a whole does not support a conclusion that there was significant actual competition in the sale of local credit reports between the RCA office in Washington and either CBDC or Stone's. One former employee of Stone's testified that RCA did sell credit reports in the District of Columbia area. (Tracey 2005) However, another former employee stated his belief that RCA sold credit reports only in conjunction with mortgage loans made by insurance companies to whom RCA sold insurance reports. (Fletcher 2253) Both witnesses testified that they did not consider RCA to be in competition with Stone's. (Tracey 2253; Fletcher 2261) In addition, CBDC's 6(b) report did not list RCA as a competitor in 1967 or 1969. (CX 7i–j) Moreover, Washington area credit grantor witnesses all testified that they did not purchase credit reports from RCA on

Washington area residents or that they were not familiar with RCA. (Homeda 2052–53, 2061; Waterbury 8406; Holden 9127)

219. CBDC was owned by a small group of local businesses but had a large number (1,000) of subscribers to its services. Four retail firms owned 85 percent of the stock while the remaining 15 percent was scattered among approximately 20 other companies and individuals. (Waterbury 8365–66; CX 7d) Stone's was a privately owned business. (F. 69)

220. Stone's had been the principal competitor of CBDC in selling consumer credit reports until it was acquired by CBDC in 1969. Those two credit bureaus had numerous common customers which bought consumer credit reports from both and had extensive overlapping files on Washington area residents. (Tracey 2012; Homeda 2049; Fletcher 2253, 2256; CX 81c) [61]

221. CBDC had estimated local credit reporting sales of $1.55 million, or approximately 57 percent of the District of Columbia market in 1969. (CX 39c; CX 379h)[6] Stone's had sales of $1.18 million, or approximately 43 percent of sales in the relevant market. (CX 39d)[7]

222. The Distict of Columbia local credit reporting market was a highly concentrated one. After December 1, 1969, when CBDC purchased Stone's Mercantile Agency, it accounted for all of identifiable sales in the local credit reporting market. (F. 218, 221)

223. In 1969 and 1970, significant barriers to entry into the local credit reporting market existed in the Washington, D.C. area. A company would have needed the following capabilities to enter that market: substantial capital, experienced personnel, extensive credit information, the good will and cooperation of the merchants or credit grantors, and ability to offer reporting services at reasonable prices. (Tracey 2018–19; Homeda 2056; Holden 9123–25) [62]

(3) Potential Competition

224. The record as a whole shows that respondent Retail Credit

[6] CX 379 is not contained in the official binder of exhibits of this proceeding. However, it was marked for identification, and it appears from the record, although the ruling is not explicit, that it was in fact admitted into evidence. (Tr. 91–92) It was cited by both complaint counsel and respondent in their proposed findings and reply briefs, and has been considered, insofar as is herein indicated, in the preparation of these findings.

[7] Complaint counsel's proposed findings allotted $1.67 million in sales and 57 percent of the market to CBDC; $1.19 million in sales or 41 percent of the market to Stone's; and $57,017 in sales or 2 percent of the market to RCA. (CPF 218) These findings are questionable for two reasons. First, complaint counsel's proposed finding improperly counted interbureau sales as local sales. (See F. 191 n.) In the above finding, those reports have been deleted from CBDC's and Stone's local sales figures. Second, the figure for RCA was derived by applying RCA's nationwide percentage of sales of local credit reports (CX 46) to the Washington office's actual sales of $115,889. (CX 37) This method of estimating RCA's market share cannot be deemed reliable where other evidence in the record indicates that RCA's sales of credit reports in the local market were in fact minimal. (F. 145)

Company was one of a limited number of potential entrants into the Washington, D.C. market.

225. RCC had the capabilities and resources to enter the Washington, D.C. market de novo. (F. 149–160) In addition to its interest in expanding its credit reporting activities generally (F. 173–175), RCC also had particular incentives to enter that market.

226. From 1966 through 1969, RCC acquired eight credit bureaus in Connecticut, Massachusetts, New Jersey and New York with combined 1970 revenues of $1.2 million. (CX 379f)[8] The ownership of these bureaus, particularly the Credit Bureau of Central New Jersey with 1967 credit reporting revenues in excess of $500,000, was viewed as having placed RCC in a "key position" in the Middle Atlantic states. (CX 167f; CX 284e)

227. Respondent desired to "control" credit reporting in the Northeast region of the United States, and thought that it had the capacity to do so. (CX 168c) When the CBDC became available for acquisition, respondent recognized that CBDC was in a strategic location in relation to other operations of CBI. (CX 81c) Entry into Washington was viewed as having strengthened respondent's mid-Atlantic position in credit reporting. (CX 167f) The acquisition of the Washington data base was believed necessary to bring computerization to its manual credit bureaus then operating in the northeastern section of the country, for revenues generated from the Washington data base would support computerization of the New England-New Jersey [63] bureaus. (White 11,579–580) Although the fact of respondent's acquisition of CBDC does not in itself make respondent a potential entrant, this evidence of ready recognition of important advantages, together with other evidence in the record, establishes the fact that the Washington, D.C. market offered special incentives to respondent.

228. Credit grantors testified that it would have been difficult for a new entrant into the Washington, D.C. credit reporting market to have established a file competitive with the 2 million numbered files of CBDC without the cooperation of the merchant owners of CBDC (Homeda 2062; Waterbury 8402, 8405–06, 8459–60; Holden 9123–24, 9126–27); and that even non-member stores would be unlikely to incur the expense of providing credit information to a new bureau when it would be some time before enough information was amassed to constitute a file usable by them. (Holden 9123–24, 9127) However, the record does not support the inference that creation of a

[8] CX 379 is not contained in the official binder of exhibits of this proceeding. However, it was marked for identification, and it appears from the record, although the ruling is not explicit, that it was in fact admitted into evidence. (Tr. 91–92) It was cited by both complaint counsel and respondent in their proposed findings and reply briefs, and has been considered, insofar as is herein indicated, in the preparation of these findings.

competing bureau would have been unduly difficult. Only four firms in Washington had a substantial interest in CBDC (F. 68); the remaining 21 shareholders to CBDC had only a nominal interest in the bureau. (Waterbury 8420) The bulk of subscribers to CBDC had no financial interest in the bureau. (Waterbury 4819) These stores would not have been acting contrary to their own interests by supporting a new entrant, and might have cooperated with a new firm. (Waterbury 8430–31; Holden 9154) This is particularly so since at least some customers, particularly banks, were dissatisfied with the service they were receiving from the existing credit bureaus. (Homeda 2055; Holden 9141) Cooperation of the major shareholders in CBDC was not essential to creation of a competing file; those four stores constituted only 5–15 percent of the information in CBDC's files, and all bureau stockholders combined accounted for only 10 percent of the bureau's reporting volume. (Waterbury 8454, 8459; CX 81a)

229. Moreover, Stone's thrived for years as a stable competitor to CBDC, despite the fact that its files were more limited than those of CBDC (Holden 9159) and that some large District of Columbia merchants refused to give it credit information. (Tracey 2031; Fletcher 2258–62) Most large merchants, however, did give credit information to Stone's as well as to CBDC (Tracey 2011; Fletcher 2262) and many bought reports from both bureaus. (Tracey 2012) [64]

230. There is no evidence that RCC was perceived as a potential entrant into the Washington, D.C. credit reporting market in 1969 or 1970 by firms operating in that market.

(4) Effects of Acquisition

231. There is no evidence that the acquisition of CBDC by respondent eliminated significant actual competition between that firm and local RCC and RCA offices in the sale of local credit reports in the Washington, D.C. market.

232. The acquisition of CBDC by respondent eliminated respondent as a likely potential entrant into the local credit reporting market in the Washington, D.C. area. (F. 224)

E. Other Geographic Markets

233. In their "Response to the Administrative Law Judge's Directive to Define Geographic Areas in Which Anticompetitive Effects HAve Taken Place," complaint counsel stated that Salem, Oregon, Eugene, Oregon and Boise, Idaho were additional relevant

local credit reporting markets. However, complaint counsel made little effort to prove the existence of such markets at trial and have abandoned them in their proposed findings. No evidence was offered to show the existence of substantial competition between the bureaus in those areas and RCA or RCC offices in the sale of local credit reports in 1969. No evidence was offered to show that respondent was an actual or perceived potential entrant into any of those markets.

234. Complaint counsel have in their proposed findings attempted to substitute for Salem, Oregon, Eugene, Oregon and Boise, Idaho, a series of local markets defined as "each community in which [CB West Coast] had an office" and "the area surrounding each such community." (CPF 238) These proposed markets (CPF 238–241) will be disregarded because they were not defined in the complaint or in complaint counsel's later delineation of relevant geographic markets. (See F. 233) Moreover, there is no evidence that either RCA or RCC was a significant actual competitor [65] of the acquired bureaus or a likely potential entrant in any of the proposed markets in the Pacific Northwest.

F. Other Effects

235. Substitution of respondent for the acquired credit reporting firms in the Portland, Oregon, Tacoma, Washington and Washington, D.C. markets significantly raised barriers to entry in those markets. Respondent is a national chain possessing far greater resources than the acquired bureaus. (F. 17, 150–156) Since the acquisitions, respondent has integrated the acquired bureaus into its system of regional computerized credit reporting centers. (F. 19) A new entrant into these areas would therefore need substantially greater resources to compete effectively than would be the case but for the acquisitions.

236. The record does not show that the acquisitions challenged here encouraged further mergers and acquisitions in the credit reporting industry. (See Chilton 8588–90, 8693–94)

V. THE NATIONAL ACCOUNT SALES MARKET

A. The "Non-Local" Market

237. The "non-local" credit reporting market, as defined in Paragraph 8 of the complaint, is not a relevant submarket for the purposes of this proceeding.

238. The use of the term "non-local" to refer to reports sold to credit grantors not located in the same geographic area as the credit

bureau producing the report appears to have originated with Credit Bureau Reports, Inc. (CBR). (Overholser 2920) The term is not generally recognized in the credit reporting industry or by credit grantors as one which denotes a separate service market. (F. Smith 360; Kopriva 503; Gauss 660–61; T. Smith 1052; Brund 1151; Pinger 1308–09, 1312, 6955–66; Laurens 1976–77; Winthrop 5642; Carlson 7005–09; Chilton 8744–46; Spafford 8831–32, 8857–61; Rutherford 13,041–042) More widespread is the use of the term "foreign reports" to refer to reports sold to or purchased from a credit reporting firm in another locality. Foreign reports would include antecedent reports. [66] (See F. 191 n.; Brund 1104; Pinger 1312; Laurens 1976–77; Overholser 2920; Holly 6168–69)

239. A credit grantor may obtain a consumer credit report upon an applicant residing in another city or locality in several ways. First, the report may be obtained directly from the credit reporting company possessing a data base encompassing the applicant, generally by means of telephone, letter, or computer teletype terminal. Second, the credit grantor may obtain the report by requesting it from a local credit bureau in its own city, which can obtain the report from the producer in another city by means of a coupon system operated by ACB, a trade association and, in turn, deliver it to the requesting credit grantor. Third, the credit grantor could utilize the services of a broker, such as CBR, Credit Services International (CSI, a subsidiary of ACB), CMS and others, which, for a fee, will take the request from the credit grantor and transmit it to a producer possessing the necessary data base, the producer transmitting the appropriate report directly to the requesting credit grantor. Under a brokerage system the credit grantor is often provided with a listing of producers by the broker indicating the geographic area for which the broker has determined the reports will be provided by the respective producers, and the credit grantor merely sends a request to the listed producer, receiving back the appropriate report. Brokers such as CBR and CSI do not possess any data base for the production of reports. (Kopriva 470–76; Daussin 1367–69, 1471, 1394–97; Erichson 2069, 2179–80, 2189–92; Holly 6168–71; Jensen 6500–03; Carlson 7005–08, 7014–22, 7024–26, 7034–35; Garcia 7170–77; Devers 7527–34; Chilton 8694–8702, 8723–26, 8601–06, 8529–30; Spafford 8857–66; White 12,576–577; RX 26, pp. 1–4)

240. Whatever the means utilized by a credit grantor to obtain a foreign credit report, the credit report must be prepared by a producer possessing a data base encompassing the location of the applicant. There are no consumer credit reporting companies which produce and sell consumer credit reports upon consumers located in

the numerous trade areas throughout the United States. Rather, each consumer credit reporting company produces and sells consumer credit reports only upon consumers located within the geographic coverage of its data base. Credit grantors, wherever [67] located, can obtain credit reports on a consumer only from the credit reporting firm possessing a data base encompassing that particular consumer. Since usually only one or two credit reporting firms possess the information for a particular geographic area, the number of competing producers for a specific area is very small, while the total number of producers is large. Producers of consumer credit reports compete with each other only to the extent that they possess common geographic coverage. (Erichson 2073–77; Pinger 6980–82; Carlson 7024–26; Garcia 7192, 7264–69, 7277–81; Devers 7439–40, 7696–97; 8303–04; Chilton 8601–06, 8723–26; Spafford 8808–09, 8933–35; Sasser 9253; White 11,674–677, 11,701–705)

241. Brokers of credit reports such as CBR and CSI are not producers of credit reports, but simply provide a means whereby credit grantors can obtain foreign reports from appropriate producers. As brokers, they operate and compete at a different functional level than credit bureaus, which produce and sell credit reports. Thus, credit bureaus do not generally compete with brokers, but use brokers to market their reports to credit grantors located outside their individual service areas. (Daussin 1428–43; Devers 7527–32; Chilton 8601–04; Spafford 8861; White 11,757–762, 12,608–612)

B. The National Account Sales Market

(1) Definition of the Market

242. The credit reporting industry recognizes the sale of credit reports to regional and national credit grantors as a distinct service market, which may be termed national account sales. (See Devers 7528) The national account sales market is a relevant service market for the purposes of this proceeding.

243. Regional and national credit grantors are firms which make credit determinations from credit granting centers responsible for areas of the country broader than the data base or service area of a single credit bureau, [68] which is typically a community or metropolitan area.[9] Such credit grantors require credit reports on a

[9] Some sellers of credit reports, including CBR and CSI, use the term "area" as well as "regional and national" to describe credit grantors who commonly purchase reports in more than one local market. In these findings, credit grantors referred to as regional and national shall include those which are referred to by some industry members as area credit grantors. This terminology is consistent with that generally used in the industry. *Compare* Erichson 2081 (area credit grantor is one with a regular need for reports on people living in an area at least as large as part of one state but not as large as substantially all of a region of the country; regional credit grantor is one with a need for reports over substantially all of a region of the country) *with* F. Smith 256 (regional credit grantor is one which

(Continued)

regular basis from more than one or several credit bureaus. It is impractical for them to deal with and be billed by a large number of individual bureaus. (Kopriva 474–76; Brund 1104; Erichson 2074–75; Winthrop 5662; McGregor 5795–96; Jensen 6491–92; Carlson 7018–19; Rutherford 13,383, 13,408; CX 82 o; CX 159b-c) At the same time, most individual credit bureaus cannot effectively market their credit reports to regional and national credit grantors located outside their service areas. (T. Smith 1018–19)

244. Regional and national credit grantors which purchase credit reports include oil companies, travel and entertainment card companies, financial institutions, large retail chains, and mail order houses. (Pinger 6915; Spafford 8882–83; White 12,573; CX 260; CX 339 *in camera;* RX 26, p. 2; RX 217z3)

245. Regional and national credit grantors typically purchase written rather than oral credit reports. These credit grantors generally do not require instant access. [69] to credit information on consumers. (Jensen 6503–04, 6507–08, 6649z14-z15; Pinger 6915; Devers 7526)

246. CBR identifies its market as the sale of reports to area, regional and national credit grantors. (Daussin 1363; Erichson 2080, 2209–10) For purposes of defining the scope of its operations in relation to that of the local bureaus under contract with it, CBR terms its market "nonlocal credit reporting." (Erichson 2207–09)

247. Mr. Spafford, president of ACB, identified the sale of credit reports to area, regional and national credit grantors as a separate service market. (Tr. 8865–66, 9001) ACB established a separate subsidiary, Credit Services International (CSI), to sell in competition with CBR and CMS. CSI defines its customers in terms of the number of communities in which they conduct their business, the number of credit reports purchased monthly and whether or not they have "central credit operations." (Pinger 1233; Spafford 8862, 8868–69, 8982; CX 547)

248. Other credit reporting companies also identified the sale of credit reports to regional and national customers as a separate market. One firm, Cordura Corporation, had explicit definitions for regional and national customers similar to those of CSI. (Holly 6176–77; Jensen 6497; Sasser 9326; RX 217q-r, z3)

249. Respondent also recognizes the existence of a separate market for the sale of credit reports to national and regional credit grantors. Mr. Rutherford, executive vice president of Retail Credit,

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operates its business in more than one metropolitan area, and requires the services of several bureaus rather than one) *and* Holly 6176 (a regional credit grantor is one which crosses over local geographic data bases in granting credit). (See Kopriva 474; Pinger 1230; CX 7t; CX 71; CX 26a; CX 80f; CX 189a; CX 300; RX 217q-r, z3)

identified CBR, CSI and CMS as competitors in the sale of credit reports to regional and national credit grantors, which he defined as companies which extend credit over a large geographic area encompassing a number of states or the entire nation. (Tr. 13,373, 13,408) Respondent's corporate documents also identify a separate service market based on the sale of credit reports to regional and national credit grantors. (CX 26; CX 71; CX 169; CX 189; CX 367; CX 370)

250. Credit reports sold to regional and national credit grantors by national brokerage organizations are sold at prices set independently of the price charged by the local bureau making the report. Until recently CBR [70] sold all its reports at a uniform national price, which could be higher or lower than the price normally charged by the credit bureau originating the report. CBR would deduct its commission from the national price, and remit the remainder to the bureau. In the past few years, CBR has allowed its contract bureaus to set the prices at which their reports will be sold, but only a few bureaus have taken advantage of this provision. (Daussin 1428–36; Erichson 2227–29) CSI (as did CMS while it was functioning as a broker) also sets the price at which its reports will be sold nationwide. (T. Smith 1026–27; White 12,617–618) ACB likewise sets the price at which reports are sold through the interbureau coupon system, and this price is sometimes lower than the price a bureau would charge to its local customers. (T. Smith 1060–61) There is price competition in the sale of reports to national accounts at the brokerage level. (RX 28)

251. Individual bureaus normally charge a higher price for out-of-town or foreign reports generally, to reflect higher handling charges. Some bureaus also charge higher prices to out-of-town credit grantors to compensate for the fact that these credit grantors do not contribute to the bureau's data base. (Pinger 1236–37; Fletcher 2264–65; RX 189; RX 207; RX 287) Computerized bureaus, however, often charge their direct terminal customers the same price for reports on all persons residing in an area which is part of the data base stored on a central computer. (Holly 6169–70; Chilton 8605–06)

252. The revelant geographic market for national account sales is the nation as a whole. The customers in this market conduct their businesses regionally or nationally, and have a need for credit reports from large areas of the country. (Erichson 2080–81; Jensen 6491–92; Pinger 6916) CBR and the other brokerage organizations, such as CMS and CSI, market reports on a national basis. (CX 82k;

CX 169a; CX 547) Large direct sellers such as RCC/RCA and Hooper Holmes also market on a national basis. (King 3319; CX 82 o)

(2) Structure of the Market

253. The primary firm engaged in the sale of credit reports to regional and national credit grantors in 1969 and 1970 was CBR. Other companies selling reports to these [71] credit grantors were RCC/RCA, TRW Credit Data, Hooper Holmes, credit bureaus which sold credit reports on residents of their service areas directly to national and regional credit grantors, and a number of independent credit bureaus who acted as brokers to obtain reports from other credit bureaus for sale to regional and national credit grantors through the use of the ACB coupon system. (F. Smith 338; T. Smith 1023–24; Pinger 1240; Daussin 1377, 1387–97, 1469; Erichson 2082–85; King 3318–20; Jensen 6499; Garcia 7169–73, 7190–91; White 12,597; Rutherford 13,414; CX 82 o)

254. CBR is a nonexclusive marketing agent for its approximately 2,000 member local credit bureaus throughout the country. CBR had written contracts with each of its member bureaus committing it to market their credit reports to regional and national credit grantors, and committing the bureaus to produce reports for CBR. Each CBR customer received a directory of member credit bureaus and ordered its reports directly, using CBR order forms, from the bureau possessing a data base covering the locality where the applicant on whom the report was sought resided. The customers were billed by and paid CBR a standard price for each kind of report, and CBR in turn paid its member bureaus a uniform "net price" for the reports. CBR's revenues were based on its commission, which was the difference between the price it charged its customers and the net price it paid to the bureau producing the report. (Pinger 1230–31; Daussin 1368–76; Erichson 2069, 2190–91; RX 26, pp. 1–2)

255. Two other brokerage firms were organized in late 1970. CMS was a wholly-owned subsidiary of CBI, while CSI was a subsidiary of Associated Credit Bureaus, the trade association. These organizations conducted their business in a manner similar to that of CBR. (Erichson 2083, 2102–03; Rutherford 13,159, 13,373; CX 547; see F. 36–39)

256. Individual credit bureaus referred to by the industry as "brokers" also sold credit reports to regional and national credit grantors in 1969 and 1970. Brokering is the use of the ACB interbureau coupon system to obtain credit reports on a systematic basis for national and regional credit grantors from bureaus located outside the territory or trade area covered by the bureau engaged in

brokering. By using ACB coupons the brokers could obtain [72] credit reports from all ACB member bureaus, thereby providing nationwide reporting coverage. Brokers bought reports from other bureaus at the coupon price and then resold the reports to their customers. (F. 107; Daussin 1377; T. Smith 1024; Erichson 2083)

257. In 1969 and 1970, Hooper Holmes prepared and sold its "Credit Index," a form of credit report to regional and national credit grantors. The Index was a computerized file summary of derogatory information on consumers submitted by the credit grantors which were subscribers to the Index. The Index service was geared to large volume users and Hooper Holmes solicited only regional and national companies such as oil companies, book and record clubs and direct mail merchandisers. The Index was used primarily for prescreening of mailing lists, but was also used to evaluate credit applicants. (King 3318–23, 3349; Jensen 6498–6500)

258. Some credit bureaus sold credit reports concerning residents of their service areas directly to national and regional credit grantors. This type of direct selling is becoming more prevalent particularly among the computerized credit bureau chains. These firms often have a separate department, marketing effort or manager responsible for national accounts. (F. Smith 259; Pinger 1234, 1237–38; Holly 6100; Jensen 6497; Devers 7528–29; Chilton 8698–99; White 11,780, 12,575, 12,597–598; CX 80f, h; CX 352b)

259. RCC, in combination with RCA, sold credit reports directly to regional and national credit grantors. (Daussin 1377, 1404; Erichson 2082–85; King 3320; McGregor 5808–09) RCC solicited sales to national and regional credit grantors, but the reports which it sold to those customers were often prepared by RCA. (F. 25; Rutherford 13,783–784; CX 30; CX 64) RCA, in turn, sold to its customers reports prepared by RCC or CBI on applicants residing in areas where RCA did not have an office, and advertised that it was a company with nationwide operations which could secure a report from anywhere in North America. (CX 125; CX 131b; CX 142g) RCC and RCA also jointly published a directory of all their offices to which credit grantors could write for credit information on subjects located in the geographic area of those offices. (CX 52) [73]

260. Companies with computerized credit reporting systems, CBI, TRW Credit Data, ACS, Chilton and Trans Union, have recently begun to use terminals located in customers' offices which can directly access their credit reporting data bases. Under this system, a customer located anywhere in the United States who possesses a terminal can obtain credit reports from any location encompassed in the reporting company's data base. The report is transmitted

electronically to the customer from the company's central computer. (Jullien 565–66; Day 697, 768; Brund 1132–33, 1150; Pinger 1234–35, 1295–96, 1238–40, 6862–65; Jensen 6500–02; Garcia 7168–76; Devers 7527–34; Chilton 8604–06, 8742–44; Aitken 10,675–676, 10,814–818, 10,821–825; White 11,545–557, 11,677–683, 12,099–109)

261. CBI and other computerized credit reporting firms continue to sell credit reports to regional and national credit grantors through CBR. (F. 264; Pinger 1295; Daussin 1437–43; Jensen 6539; CX 82 o; RX 119) CBI also sells reports through CSI. (White 11,761)

262. CBR competes with the other brokerage organizations, CMS and CSI, and with independent bureaus which act as brokers using the ACB coupon system, in the sale of credit reports to regional and national credit grantors. (Daussin 1388; Erichson 2103–04, 2192–2208, 2283–84; RX 26, pp. 7–8) Although direct sellers do not compete directly with brokers, direct sales bypass the brokerage channel and tend to reduce the brokerage volume. (Daussin 1377–78, 1387–97; Erichson 2083–84; Devers 7532; White 12,609–612; CX 82 o; RX 26, pp. 7–8) However, the record shows that the bulk of local credit bureaus do not sell directly to regional and national accounts, relying instead on brokers, primarily on CBR. (F. 264, 270)

263. The record does not contain accurate figures showing the total universe of sales of credit reports to national accounts, the magnitude of direct sales, or the volume of brokered sales made through the use of ACB coupons.

264. CBR was the dominant firm in the national accounts market in 1969 and 1970. CBR's total billings in 1969 were $17.1 million; in 1970 total billings amounted to $15.56 million. (Daussin 1419; Erichson 2105) CBI revenues from CBR-brokered sales were $716,616 in 1969 and $663,363 in 1970, CBDC's $291,988 in 1969 and $323,792 in 1970, CB West [74] Coast's $533,624 in 1969 and $434,206 in 1970. CB Portland's 1969 revenues from CBR-brokered sales amounted to $34,233; its 1970 figures are unavailable. (CX 39c; CX 41b; CX 42b; CX 170b)

265. The other brokerage organizations, CSI and CMS, were not in existence in 1969 and did not operate in 1970. (CX 188; CX 547; CX 548) It is not possible to determine precisely the dollar volume of reports brokered to national accounts through the use of the ACB coupon system. (See CX 213) Complaint counsel estimated such sales to be $2.6 million in 1970. (CPF Appendix C *in camera*) However, this estimate reflects only the coupon price for these brokered reports, not the price at which they were resold to customers. (CX 213)

266. RCC and RCA made direct credit reporting sales to national accounts in 1969 in the amount of $4,727,600 and $1,416,834,

respectively, and sales in 1970 of $4,854,000 and $1,311,544, respectively. Neither firm made any sales through CBR or by the use of ACB coupons. (CX 40; CX 43) However, these figures may overstate RCC/RCA sales for two reasons. First, there is evidence that RCC sells to its customers reports which are in fact prepared by RCA. In such cases, RCA bills RCC for the report, and RCC in turn bills its customers. (See, *e.g.*, Rutherford 13,782, 13,784) Such sales could appear in the sales figures of both companies, and therefore be double-counted when sales figures are combined. The record does not reflect to what extent RCA sales are double-counted in the sales figures which appear on CX 40 and CX 43. Second, respondent contends (RRB 22-23) that its sales figures include many services which it sells to regional and national credit grantors which are not credit reports and which do not compete in any way with the reports sold by CBR. It is stated at CX 43b that the figures contained in that document under the heading of updated or revised credit reports encompass all the credit and collection service advertised in RCC's sales brochure entitled "Credit Services," which is found at CX 30. A comparison of CX 30 with CBR's price list (CX 461) shows that many, but not all, of the services listed in CX 30, were also provided by CBR. RCC sells reports such as chattel mortgage checks, credit card pick-up services, property check reports and oil dealer surveys which are not sold by CBR. (CX 30; CX 461) The figures supplied by respondent [75] for credit card pick-up revenues in 1969 and 1970 (CX 43b) have been subtracted from the total figures found at CX 43a to arrive at total national account sales, but the record does not reflect the extent to which other non-competitive services accounted for RCC's total revenues. Also included in sales figures for both RCC and CBR are collection aids such as slow payer and skip and locate reports. (CX 30; CX 461)

267. CBI made direct sales to national accounts in 1969 and 1970 in the amount of $515,285 and $521,803, respectively. CB West Coast's direct sales to national accounts in those years amounted to $664,786 and $312,199, respectively. CBDC's direct sales for the same years were approximately $200,000 and $35,000, respectively. CB Portland made direct sales of $16,158 in 1969; its 1970 sales are unavailable. (CX 41b; CX 42b; CX 379h;[10] CX 170b) Combined direct sales of RCC, RCA and CBI in 1969 were $6.67 million, or about 39 percent of CBR total gross billings. 1970 direct sales of RCC, RCA, CBI, and CB West Coast were $6.99 million, or about 45 percent of

[10] CX379 is not contained in the official binder of exhibits of this proceeding. However, it was marked for identification, and it appears from the record, although the ruling is not explicit, that it was in fact admitted into evidence. (Tr. 91-92) It was cited by both complaint counsel and respondent in their proposed findings and reply briefs, and has been considered, insofar as is herein indicated, in the preparation of these findings.

CBR gross billings. (See F. 264, 266) Addition of CBDC's direct sales for 1970 does not significantly change respondent's sales as a percentage of CBR sales. Total direct sales of the acquired bureaus were $1,396,229 or about 8.2 percent of CBR billings in 1969, and $869,002 (excluding sales of CB Portland) or about 5.6 percent of CBR billings in 1970. (See F. 264)

268. Hooper Holmes made sales to national accounts through its Credit Index in the amount of [see *In Camera* Findings].

269. The record does not disclose the volume of direct sales to national accounts made by TRW in 1969 or 1970. Complaint counsel relied on testimony that TRW sells [76] 95 percent of its credit reports within the local service area of its bureaus (Day 715), and applied that percentage to TRW's total credit reporting sales (CX 385 *in camera*) to estimate that company's sales to regional and national credit grantors. However, sales made to credit grantors located outside the reporting bureau's service area counties cannot necessarily be equated with sales to national and regional credit grantors. For one thing, such sales may include sales of antecedent reports. In addition, regional and national credit grantors could purchase reports from credit granting centers located within the geographic service of a local bureau. Such sales would nonetheless be national accounts sales.

270. The president of CBR estimated that all its affiliated bureaus, excluding CBI, made direct sales to national and regional credit grantors in 1970 in the amount of $6.9 million. (Erichson 2090, 2099, 2119) When CBI's direct sales of $521,803 (CX 42b) are added to this figure, direct sales by credit bureaus in 1970 can be estimated at $7,421,803 or about 48 percent of the amount of CBR gross billings. Direct sales to national accounts for RCC, RCA, and all credit bureaus in 1970 can be estimated to be about $13,992,000 or about 90 percent of the amount of CBR gross billings. (See F. 264, 266)

(3) Effects of the Acquisitions

271. Complaint counsel have failed to prove that the acquisitions which are the subject of this proceeding may substantially lessen competition in the national accounts market by eliminating actual competition between respondent and the acquired bureaus, or between CB Portland and CB Metro Portland. RCC or RCA could compete with the acquired bureaus only insofar as they engaged in the preparation of credit reports on applicants in the acquired firms' geographic areas. (F. 240) There is no evidence that RCC competed directly with any of the acquired bureaus in the production of credit reports (see F. 184, 201, 212, 231); the record shows that RCA

competed to a significant degree only with CB Tacoma. (See F. 186, 201, 213, 231) CB Tacoma did not sell to national accounts directly, but used CBR. (CX 307g) The record does not reflect the extent to which the RCA Tacoma office sold credit reports to regional and national credit grantors. CB Portland and CB Metro, Portland competed with one another, and both made some sales, [77] either directly or through CBR, to national accounts. (CX 170b; CX 171g) However, the volume of sales by these bureaus is too insignificant to have an impact on the structure of the national accounts market, which encompasses the nation as a whole. (F. 252; see CX 170b; CX 171g; CX 307g)

272. Complaint counsel also have failed to prove that the acquisitions challenged in this proceeding may substantially lessen competition in the national accounts market by substantially increasing concentration in that market. Since the record does not contain reliable evidence establishing the universe of reports sold in the market, it is not possible to determine the market shares of the competitors in the market, or changes therein resulting from the challenged acquisitions. Moreover, individual credit bureaus, whether they sell to national accounts directly or through a brokerage system, compete with one another only to the extent to which they compete at the local level in the production of credit reports. Brokers compete directly with one another in the sale of reports in the national accounts market, and it is clear from the record that CBR is by far the dominant broker in the market. (F. 264) Brokers also compete indirectly with direct sales by credit bureaus in the sense that direct sales reduce the broker's commission. The structure of the national accounts market can be determined only by comparing the sales of the brokerage organizations to one another, and of the brokerage organizations to direct sales by credit bureaus and credit bureau chains. The development of new brokerage organizations and the increase in direct sales has pro-competitive effects to the extent that it reduces CBR's domination of the market and provides regional and national credit grantor customers with alternative methods of obtaining credit reports from producing bureaus. It is also to the advantage of the producing bureaus to have alternative methods of marketing their reports. (Erichson 2227–28)

273. In order to compete successfully in the national accounts market, a broker of credit reports must have nationwide reporting coverage, and there exist only a limited number of sources of credit reports for a nationwide reporting system. (Daussin 1416–17, 1513–14; Erichson 2077–78, 2113–15; Rutherford 13,159–161) Complaint counsel argue that the acquisitions made by [78] respondent increase

the chance that it will withdraw its bureaus from CBR, leaving that system with gaps in its reporting coverage and therefore at a substantial competitive disadvantage, or will refuse to cooperate with a new entrant. (CPF 391–393) There is no evidence that respondent intends to withdraw its bureaus from CBR or any other brokerage system; all CBI bureaus continue to sell credit reports through CBR and CSI. (Daussin 1509; White 11,761) This fact does not of course demonstrate that respondent will not withdraw its bureaus from CBR in the future. It has been prohibited by court order from doing so as a result of the litigation between CBR and respondent. *Credit Bureau Reports* v. *Retail Credit Company,* 385 F. Supp. 780, 797 (S.D. Tex. 1971), *aff'd* 476 F.2d 989 (5th Cir. 1973). When the injunction expires, respondent has the power to withdraw its bureaus, and its doing so would hamper CBR. (Daussin 1408–09, 1413–14; Erichson 2115) However, the record does not show that such withdrawal will effectively destroy CBR, depriving the contract bureaus of their primary means of marketing their reports to regional and national credit grantors. Furthermore, it does not appear that respondent would have any incentive to refuse to sell its reports through CBR or any other broker, for the producing bureau profits from the sale whether it is made directly or through a broker. It is likely that CBI will attempt to increase its direct sales, particularly those made by direct terminal access, but CBR, long the dominant seller in the national accounts sales market, is not entitled to the aid of the antitrust laws to maintain its market position.

VI. LIFE AND HEALTH INSURANCE REPORTING

A. Definition of the Market

274. Life and health insurance reporting is the furnishing of underwriting information to life and health insurance companies for use in determining the desirability of applicants as risks for life or health insurance and as an aid in determining the applicable rates. Tamalis 2413; Wood 2785; King 3300; Mitchem 3657; CX 579b; CX 622b)

275. Health insurance underwriting is concerned with information regarding morbidity risks, *i.e.* the likelihood of illness or injury to the applicant. Life insurance [79] underwriting is concerned with information regarding mortality risk, *i.e.*. the likelihood of early death. (Mitchem 3678–79) Thus, the purpose of a life insurance report is to assess the mortality risk of the applicant, while the purpose of a health insurance report is to assess the morbidity risk of the applicant. (Flory 10,045–048)

276. RCC and other companies produce separate life and health insurance reports, which are generally sold to different companies or to separate departments of the same company. (Tamalis 2411; Mitchem 3673, 3681; Flory 10,065–067, 10,061–062) However, both reports contain similar information. (Tamalis 2415; see Mitchem 3656–57) Life insurance reports contain information on the age, employment, past and current physical condition and family health history, general reputation, drinking and other habits, hazardous occupation or avocation and income and net worth of the applicant. A health insurance report contains the same kind of information, but since health insurance is often intended to replace income lost through illness or disability, more precise information on income and net worth are required. (Tamalis 2411; Alley 9411–13; King 3300)

277. Life insurance companies use actuarial tables and other data in addition to the insurance report in determining whether to sell life insurance to an applicant. (Flory 10,066–067)

278. Life and health insurance reports are sold only to life and health insurance companies, and are not suitable for use by fire and casualty insurance companies. A number of insurance companies sell both life and health insurance; companies do not generally sell life and health and fire and casualty insurance. (Tamalis 2417; Wood 2802; King 3299–3300; Flory 10,062, 10,464)

279. There are a number of types of life and health insurance reports. (Wood 2785; King 3300) RCC, for example, sells three basic types of life insurance reports: regular, special narrative and special service. Health insurance reports, now termed income protection reports, include disability reports, major medical reports and hospitalization reports. (Flory 10,045) Prices for RCC's reports in 1970 ranged from $4.25 to an hourly rate of up to $14.50 for more complex reports. (CX 574) [80]

280. Life and health insurance reports are prepared through field investigation, including personal interviews with the applicant and with other sources of information such as neighbors or employers of the applicant. (Wood 2816–19; Alley 9416; Flory 10,375)

281. There is a trend toward the use of less information in life and health insurance reports due in large part to the desire of life and health insurance companies to curtail their rising expenditures for insurance reports. RCC has introduced reports which contain less information and are less costly than regular reports, but which can be used for the same underwriting purposes. (Flory 10,108–109, 10,141–142) These lower cost Streamline and Notification or Report Service (NORS) reports for regular life insurance policies are investigative reports. (Flory 10,108, 10,431) For high volume, low

premium policies such as industrial life or student life, for which regular reports are not generally ordered, RCC has developed a procedure for spot check verification of identity, address and employment or student enrollment of the applicant. These reports are less expensive than even abbreviated regular reports, and may or may not be made through interviews or field investigation. (Flory 10,427–430) The record does not reflect the magnitude of the market for these types of reports or whether credit bureaus could produce them.

282. As the cost of insurance reports has risen, insurance companies have begun increasingly to rely on methods of evaluating the insurability of an applicant other than insurance reports, primarily using reports prepared in-house by employees of the company or information contained in the insurance application or questionnaire. In addition, a number of life and health insurance companies have raised the standard value of a policy below which they will not purchase a report. As a result, the number of reports sold by insurance reporting companies, including respondent, has decreased. (Tamalis 2518; Mitchem 3693–99, 3702, 3713–15; Holloway 9025–30, 9060–63, 9080–81; Alley 9392–9410, 9420–22, 9438; Flory 10,069–079; Burge 10,970–978, 10,987–988; RX 56; RX 341)

283. The record as a whole supports the conclusion that life insurance reports and health insurance reports constitute a single market in spite of certain differences between the two. RCC documents demonstrate that the [81] company generally groups life and health insurance reports into one service market. (CX 23i; CX 24f; CX 25i; CX 82i; CX .96c; CX 363z38; CX 547; CX 610f) In their testimony in this proceeding, officials of RCC's two principal competitors, Hooper Holmes and American Service Bureau, also treated life and health insurance reporting as one market distinct from fire and casualty insurance reporting. (Wood 2788–2800; King 3299–3307)

284. Two recognized industry publications, *Best's Review* and the *National Underwriter,* maintain the distinction between life and health insurance companies on the one hand and fire and casualty insurance companies on the other. (Flory 10,460–461)

285. The ability to provide reports on a nationwide basis is necessary to compete effectively in the life and health insurance reporting market. (Tamalis 2417–18; Wood 2797–98; King 3307)

286. The relevant geographic market with respect to life and health insurance reporting is the nation as a whole. In 1970 the three principal competitors in the market sold life and health insurance

reports on a nationwide basis. (Wood 2897; King 3307–08; CX 47m; CX 82z62)

B. Structure of the Market

287. The three principal competitors in the life and health insurance reporting market in 1970 were Retail Credit Company, Hooper Holmes, Inc. ("Hooper Holmes") and American Service Bureau ("ASB"). (Tamalis 2419; Wood 2794; King 3302; Flory 10,393; CX 82i, z62; CX 96d) Several small companies sold life and health insurance in local or regional geographic areas. (Wood 2796; King 3302, 3307–08; Holloway 9030–31)

288. The record does not contain precise figures for total sales of life and health insurance reports in the United States. Industry witnesses estimated the total universe of sales in 1970 to be $58 to $60 million (including in-house reports) and $53 to $58 million (excluding in-house reports). (Wood 2794, 2797; King 3305–06) [82]

289. The record does not reflect the precise market shares of the three largest competitors in the life and health insurance reporting market. It is clear from the record, however, that RCC was the dominant company. Individuals familiar with the industry estimated that the shares of the three principal competitors were as follows:

Retail Credit Company	75–85%
American Service Bureau	5–9%
Hooper Holmes, Inc.	5–9%

(Wood 2796; King 3303; CX 23j; CX 24f)

290. The relative market shares of the three leading companies in the market have remained stable for a number of years. (CX 23j; CX 59e; CX 96d; Wood 2796) American Service Bureau failed to significantly increase its share of the market even though its prices were lower than those charged by RCC. (Wood 2799–2800)

291. RCC was considered to be a price leader by both of its principal competitors. Mr. Wood, president of ASB testified: "I would say Retail Credit Company has been the price leader in the inspection business for many years." (Wood 2799) Mr. King, chairman and former president of Hooper Holmes, testified that the "major consideration" in establishing its life-health insurance reporting prices in 1969 and 1970 was "the dominant position of our chief competitor, Retail Credit Company." (King 3306–07)

C. Potential Competition

292. In 1966, CBR announced its intention of entering into life and health insurance reporting. In 1969, it began a detailed study of the insurance reporting industry. (Tamalis 2412, 2420–23)

293. In 1971, CBR conducted a survey of its approximately 2,000 affiliated credit bureaus to determine whether they would be interested in providing specialized reports to insurance companies. Chilton and CBI bureaus did not respond to the questionnaire. Of the 1,890 bureaus which did respond, 70 percent indicated that they would be interested in such a project. (Tamalis 2430–36; CX 308c) [83]

294. In March 1972, CBR began a pilot program using approximately 185 of the 220 CBR credit bureaus in Texas to produce insurance reports for life and health insurance companies. These reports were investigative, but the investigation was to be done by telephone, rather than face to face in the field by existing employees of the credit bureaus. (Tamalis 2449–50, 2495–96, 2506, 2732–35; CX 192; CX 249c-e) The Chilton bureaus in Texas, among others, declined to participate in the project because they felt that credit bureaus should not be involved in investigative reporting. (Tamalis 2735, 2506–07; Chilton 8529–31) Since RCC had no credit bureaus in Texas, it was not invited to participate in the project. (Tamalis 2507; White 11,662–665) With one possible exception, no bureau located in a large metropolitan area participated in the pilot project. (Tamalis 2505–09)

295. The pilot project was terminated in July of 1973, and the effort to sell investigative reports produced by credit bureaus abandoned because it was determined that meaningful sales could not be made of insurance reports prepared by credit bureaus. (Tamalis 2450; 2514–15) The project failed primarily because many insurance companies would not accept reports prepared through telephone investigation, or were satisfied with the service they were receiving from existing companies and saw no reason to change their sources of reports. (Tamalis 2450–51; 2501; 2511–12)

296. Life and health insurance companies will not purchase insurance reports prepared by credit bureaus in the manner attempted by CBR because telephone investigative methods are unacceptable to insurance underwriters who generally require that the applicant be contacted personally (Tamalis 2450–51, 2560–61, 2728–29; Alley 9415–18; Flory 10,375–376; CX 408), and because insurance companies are reluctant to switch from their present sources of reports to new sources which offer them no particular advantage. (Tamalis 2450; Mitchem 3690–92; Alley 9422–24; CX 408) In addition, many credit bureaus are unwilling to engage in

investigative reporting, including insurance reporting. (Tamalis 2495–96, 2498–99, 2509–11; Pinger 6946–47; Chilton 8529–31; see Sasser 8891–95) [84]

297. Credit reports of the kind customarily produced by credit bureaus are not used, and are not generally suitable or adequate for use by life and health insurance companies as a basis for underwriting decisions. (Wood 2816–19, 2843–46; King 3308–12, 3334–36; Mitchem 3666–67, 3690–92; Holloway 9029–23; Alley 9414–15; Flory 10,373–376)

298. A few credit bureaus have sold insurance reports to life and health insurance companies for underwriting purposes. (Tamalis 2428; Overholser 2922) In 1963 Computer Credit Company (CCC) tested selling consumer credit reports to an insurance company for use in underwriting, but the experiment was terminated after a short time when the insurance company determined that the reports were unsuitable for its purposes. CCC made no further efforts to sell its reports to insurance companies. (Sasser 9255–56, 9298–99)

299. In 1969 and 1970, Retail Credit considered CBR to be a potential competitor in the sale of insurance reports. (CX 82 l; CX 159g; CX 400; CX 402) Its bureaus refused to respond to CBR's questionnaire on insurance reporting, for the stated reason that the company did not believe that credit bureau files should be used for any purpose other than credit reporting. (Tamalis 2434, 2458; White 11,661–670, 11,652–659; CX 3; CX 31a, z7; CX 308c; CX 398; CX 399)

300. CBR remains interested in selling credit information to insurance companies for underwriting purposes. (Tamalis 2457–58, 2511, 2520) However, it has abandoned its efforts to involve credit bureaus in investigative insurance reporting and is restricting its efforts to attempts to market traditional consumer credit reports to insurance companies for the purpose of evaluating the persistency of an applicant. Persistency refers to the likelihood that a given policy will remain in force for a specific period of time. CBR believes that credit reports may be useful in predicting the possibility that an applicant will allow his policy to lapse. (Tamalis 2471–72, 2743–44) There is no evidence that credit reports sold for this purpose are competitive with insurance reports sold by credit investigative agencies for use in determining insurability and rate classification. (*Compare* Complaint Pars. 8c, d, 1c with Pars. 8a, b, 1a) [85]

301. Owners of two credit bureaus testified in this proceeding that they would be interested in selling reports to insurance companies if a program were developed for marketing existing products of the credit bureau to insurance companies. (Pinger 6946–47; Chilton 8679) However, the evidence shows that life and health

insurance companies will not purchase credit reports in lieu of investigative insurance reports. [See *In Camera* Findings]

302. None of the credit bureaus which were acquired by respondent and are the subject of this proceeding engaged in insurance reporting prior to its acquisition, and there is no evidence that any of them would have done so but for the acquisitions. (F. Smith 338–39; CX 7; CX 170; CX 171; CX 176; CX 307)

D. Effects of the Acquisitions

303. The acquired bureaus were not actual or potential competitors of RCC in the sale of life and health insurance reports, either as independent vendors or as parts of a competitive system. On the contrary, the record demonstrates that the acquired bureaus did not produce insurance reports prior to their acquisition (F. 302), that credit bureau reports are not generally suitable for use by insurance companies for underwriting decisions (F. 297), that a recent experiment in marketing insurance reports prepared by credit bureaus was a failure (F. 295), and that insurance companies will not purchase insurance reports prepared by credit bureaus (F. 196). There is a possibility that insurance companies will purchase credit bureau reports for the purpose of predicting persistency, but there is no evidence that such reports would be competitive with insurance reports of the type sold by RCC, Hooper Holmes, and ASB.

304. Since the acquired credit bureaus were not potential competitors in the life and health insurance market and there is no evidence that credit bureaus' files or facilities are of any use to RCC in its insurance reporting functions, it is concluded that complaint counsel have failed to prove that the acquisitions challenged in this proceeding raised or may have raised barriers to entry in the life and health insurance reporting market. [86]

VII. FIRE AND CASUALTY INSURANCE REPORTING

A. Defintion of the Market

305. Fire and casualty insurance reporting is the furnishing of underwriting information to fire and casualty insurance companies for the purpose of determining the desirability of applicants as risks for fire and casualty insurance and as an aid to determining the applicable rates. (Nead 2862; CX 597b; CX 622b)

306. Property or fire insurance is written to insure property against the risk of its destruction or liability arising from its use. Automobile or casualty insurance is written to insure a vehicle, and against liability arising from its use. (Flory 10,171–173)

307. The terms "fire and casualty," "property and liability" and "property and casualty" are synonomous for insurance purposes. (Tamalis 2413; Nead 2856; Flory 10,463–464)

308. Insurance reporting is divided into two general categories, life and health insurance reporting (see F. 274–275) and fire and casualty insurance reporting. The basic distinction between the two types of reports is that the first are reports on the individuals to be insured, and the latter are reports on the property to be insured. (Tamalis 2413; Holloway 9057)

309. Both property and casualty insurance reports contain the same types of information: identity, age, occupation, and duties of the applicant, and the physical characteristics of the property being insured. (King 3313; CX 363z38; CX 579b; CX 622b) However, property or fire insurance reports focus on the condition and value of the property being insured, the extent of its fire protection, history of losses on the property, and the potential liability arising from its use. Automobile insurance reports focus on the condition and use of the automobile, the identity of the drivers and their driving habits, the physical and mental condition of the drivers, and the habits and reputation of the applicant. (Wood 2801; Holloway 9014; Bretherick 9348–50, 9369–70; Flory 10,172–173; RX 251; RX 252; RX 253; RX 254; RX 255; RX 256, pp. 4–15) [87]

310. Most fire and casualty insurance reports are investigative reports, based on personal interviews and inspection of the property to be insured. (Nead 2884; King 3336)

311. There are many types of fire and casualty insurance reports. (RX 342; RX 343) RCC's prices for such reports in 1970 ranged from $4.50 to an hourly rate of up to $14.50. (CX 575)

312. Fire and casualty insurance reports are sold to fire and casualty insurance companies for the purpose of writing those kinds of insurance, and are not suitable for use in underwriting other kinds of insurance. (Wood 2802–03; Nead 2864–65; King 3312) Fire and property reports are often prepared by different employees of the reporting company, are sold to different insurance companies or to companies which write both types of insurance, and are not interchangeable in terms of use. (Flory 10,174–181, 10,185–186, 10,188–189)

313. The record as a whole supports the conclusion that fire and casualty insurance reporting constitute a single market in spite of certain differences between the two. RCC documents demonstrate that the company generally groups fire and casualty insurance reports into one service market. (CX 23p; CX 24j; CX 25m; CX 96h; CX 363z38; CX 575; CX 610f) An official of RCC's principal

competitor in the fire and casualty insurance reporting market, Hooper Holmes, treated that market as one distinct from life and health insurance reporting. (King 3313–14)

314. Two recognized insurance industry publications, *Best's Review* and the *National Underwriter,* recognize a distinction between fire and casualty insurance companies on the one hand and life and health insurance companies on the other. (Flory 10,461–463, 10,477)

315. Between 1969 and 1973, RCC and other insurance reporting firms experienced a significant decline in the sale of automobile liability insurance reports. (Wood 2802; Holloway 9015–18; Burge 10,994–996; RX 343) RCC's sales of property insurance reports also declined during that period. (RX 342) [88]

316. Several automobile insurance companies have wholly eliminated or substantially reduced their purchases of insurance reports primarily because they have determined that the purchase of such reports is not economically justified and because of sensitivity regarding the notification requirements of the Fair Credit Reporting Act. (Wood 2822–30; Holloway 9014–18, 9069–71; Bretherick 9350–52, 9367–68; Flory 10,217–236, 10,449–451; Burge 11,062–069, 10,995–11,004)

317. In lieu of automobile insurance reports, automobile insurers are relying in making underwriting decisions on state motor vehicle records (MVR) which they purchase either directly from the state or from automobile insurance reporting companies. Insurance companies are also relying more heavily on information contained in the insurance application form. Neither of these methods involves the field investigation and personal interviews found in insurance reports. In addition, some insurance companies are now using their own personnel to make investigative reports. (Nead 2862–64; Holloway 9025–27, 9046, 9069–72; Bretherick 9350–56, 9365–66; Flory 10,237–242, 10,584–586; Burge 10,994–998a, 11,062–069)

318. The reporting companies have reacted to the decline in the sale of fire and casualty insurance reports by attempting to develop less expensive reports. RCC, for example, has marketed abridged reports which contain less information and are therefore less costly than regular reports, but which are still suitable for use for underwriting purposes. These reports are prepared by field investigation, even when the report consists essentially of verification of the information contained in the insurance application. (Flory 10,162–163, 10,202, 10,243–244, 10,452–453; CX 9y; CX 24 o)

319. The relevant geographic market for fire and casualty insurance reporting is the nation as a whole. In 1970, two of the

three leading competitors in the market, RCC and Hooper Holmes, sold fire and casualty insurance reports on a nationwide basis. (Tamalis 2420; Wood 2803; Nead 2876) The third major company, O'Hanlon Reports, Inc., sold fire and casualty insurance reports on less than a nationwide basis, but RCC regarded it as a national competitor in the market. (Tamalis 2420; King 3314; CX 47 o; [89] CX 96 1) General Adjustment Bureau also sold fire and casualty insurance reports on a nationwide basis. (Flory 10,212-214, 10,244; CX 47n; CX 96 1) However, national coverage is not as important in fire and casualty insurance reporting as it is in health and life insurance reporting, though it is of some competitive advantage; small companies can and do compete effectively on a local or regional level. (Tamalis 2418; Wood 2803; Nead 2893-94; King 3315, 3337; Bretherick 9358-59; RX 18; RX 361; see F. 322)

B. Structure of the Market

320. The three principal competitors in the fire and casualty insurance reporting market in 1970 were Retail Credit Company, Hooper Holmes and O'Hanlon Reports, Inc. (Tamalis 2420; King 3313-14) Other companies with national or regional reporting coverage included Commercial Services, Inc., General Adjustment Bureau, Inc., Informative Research, and Henry McCurry. In addition, hundreds of smaller companies competed with the larger companies on a regional or local level. (Tamalis 2418-20; Wood 2801-03; King 3314; 3337; Flory 10,207, 10,244-245; 10,394-395; Holloway 9030-31; RX 18)

321. The record does not reflect precise total sales volume of fire and casualty insurance reports. One industry witness estimated total 1970 sales to be $95 to $100 million. (King 3313) Precise market share figures for the competitors in the fire and casualty insurance reporting market are also unavailable. An official of Hooper Holmes estimated that in 1970 RCC accounted for 66-70 percent of the market; Hooper Holmes for 12-14 percent; and O'Hanlon Reports for 7-9 percent. (King 3313-14) Another industry witness estimated that RCC accounted for 55-60 percent of the market. (Holloway 9065)

322. Entry into the fire and casualty reporting business requires trained investigators and the ability to provide accurate information in a reasonably short period of time at a competitive price. A small company can be an effective competitor in local or regional areas, because many insurance companies leave the decision on purchase of reports to local field employees, inspection of the property to be insured may be virtually the only basis of the report, and insurance companies do not require [90] data on an applicant over as extended

a period of time as do health and life insurance companies. (Tamalis 2417–20; Nead 2883, 2894–95; King 3315; Bretherick 9361; Flory 10,244–246)

323. General Adjustment Bureau entered the fire and casualty reporting market with nationwide coverage in 1969. American Service Bureau, a major competitor in the life and health insurance reporting market, expanded its operations into the fire and casualty reporting market in 1971. Its fire and casualty efforts were initially successful, but its sales volume later declined because of a general decrease in the use of insurance reports after the passage of the Fair Credit Reporting Act and because the company has chosen to deemphasize its marketing efforts in this area in favor of other aspects of its business. (Wood 2801–02, 2822; King 3345–46; Flory 10,212–214, 10,244; RX 18, pp. 3–70)

C. Potential Competition

324. There is no evidence that the acquired credit bureaus were potential competitors of RCC in the fire and casualty reporting market. None of the acquired bureaus produced insurance reports at the time of its acquisition. (F. 302) Traditional credit bureau reports are not useful in making fire or casualty underwriting determinations. (Nead 2865–66; Holloway 9045; Bretherick 9356–57) CBR's Texas pilot project (see F. 294–295) did not include fire and casualty insurance reporting, and CBR never attempted to enter that market. (Tamalis 2443–48, 2652–54)

D. Effects of the Acquisitions

325. The acquisition by RCC of the credit bureaus which are the subject of this proceeding had no adverse effect on competition in the fire and casualty insurance reporting market. The acquired bureaus were neither actual nor potential competitors in that market. (F. 324) In addition, complaint counsel have failed to prove that barriers to entry are high in the fire and casualty insurance reporting market (see F. 322–323), or that [91] the acquisition of the credit bureaus raised or may have raised barriers to entry in that market. There is no evidence that the business or facilities of the acquired bureaus relate in any way to respondent's fire and casualty insurance reporting activities.

VIII. PERSONNEL REPORTING

A. Definition of the Market

326. Personnel reports are purchased by employers for the purpose of assessing the qualifications of prospective employees. (Fletcher 2255; Wood 2783; King 3316; Jensen 6446–47; Rutherford 13,339; CX 20b; CX 21e)

327. Personnel reports generally contain information on the identity, education, income, employment history, work and personal reputation, and mode of living of a job applicant. (Fletcher 2254; King 3316; Jensen 6446; CX 20; CX 21e; CX 579b; CX 622b)

328. Personnel reports are investigative reports, requiring current as well as past information on the applicant's employment record, but the extent and depth of the investigation depends on the nature of the position applied for and the company making the report. Information may be obtained by contacting former employers, neighbors, and other references. In-file information is not sufficient for a personnel report, but the investigation can be carried out by telephone. (Fletcher 2254–55; Tamalis 2530; Wood 2782–83; King 3337–39; Jensen 6446; Pinger 6977; Spafford 8892–93; Flory 10,248–250; Rutherford 11,337; CX 20)

329. Some credit bureau firms, including TRW Credit Data and ASC, do not produce personnel reports because they prefer not to engage in investigative reporting. (Kopriva 476; Holly 6098; Jensen 6447; Pinger 6977; Sasser 9288) However, credit reports sold by credit bureaus are sometimes used by customers for employment purposes. (Smith 272; Devers 8331–32)

330. Many credit bureaus sold personnel reports in 1970. (Overholser 2932; King 3316; Burge 3883; Jensen 6447; Spafford 8892–93) These reports could contain credit [92] information plus information on the subject's employment history obtained from previous employers by telephone interview. (Fletcher 2254–55; Overholser 2933) CBR's 1971 survey of its affiliated credit bureaus showed that 85 percent of the responding credit bureaus produced some personnel reports, although these reports generally made up a very small part of the bureaus' total reporting volume. (Tamalis 2531; CX 308j) The record does not reveal the content of these personnel reports, or the extent to which they competed with personnel reports sold by RCC and other national companies.

331. Personnel reports contain different information than do credit reports; they focus on the business or employment background of the job applicant rather than on his credit worthiness. (King 3317) A personnel report could be used as a basis for a credit granting decision, but it would not be the best source of information for that purpose. (Overholser 2932)

332. Prices of personnel reports are generally higher than those

of credit or insurance reports. RCC's prices for a personnel report in 1970 ranged from $4.25 to $325.00. Hooper Holmes' reports generally cost from $7 to $9. The credit bureaus acquired by Retail Credit charged substantially more for their personnel reports than for their updated credit reports. (King 3316; CX 576; F. 338)

333. Personnel reporting constitutes a separate relevant service market for the purposes of this proceeding. RCC recognizes personnel reporting as a separate service market. (Rutherford 33,390–392; CX 132f) Other witnesses from the credit and personnel reporting industries also treated personnel reporting as a separate service market. (Overholser 2932–33; King 3316; Jensen 6446)

334. In their "Response to the Administrative Law Judge's Directive to Define Geographic Areas in Which Anticompetitive Effects Have Taken Place," complaint counsel contended that the relevant geographic markets for personnel reporting were both the nation as a whole and the seven metropolitan areas which were alleged to be relevant markets for the purposes of local credit [93] reporting. Complaint counsel have failed to prove that the alleged local areas are relevant markets for personnel reporting, or that any anticompetitive effects have occurred therein. The evidence does show that the nation as a whole is an appropriate geographic market for personnel reporting for the purposes of this proceeding. RCC and most of its competitors in the personnel reporting market sell personnel reports on a nationwide basis. (CX 20b; CX 21e; CX 47q; CX 573z43) Credit bureaus, however, sell personnel reports only within local areas, and do not solicit national accounts which require reports from more than one location. (King 3317)

B. Structure of the Market

335. The record does not reflect the precise volume of personnel reports sold in 1970 or the relative market shares of the companies engaged in the sale of such reports. Complaint counsel estimated the volume in 1970 to be between $32 and $37 million. This estimate was derived by applying the total sales of RCC, RCA and CBI to the estimate made by the president of Retail Credit in a prior proceeding that RCC had from 35 percent to 40 percent of sales in the market. (CPF 320)

336. The major competitors in the personnel reporting industry in 1970 were RCC, CBR, Dun and Bradstreet, Edris Service Corporation, Fidelfax, Hooper Holmes, Informative Research and Wackenhut. Firms such as Pinkerton and Burns Detective Agency also conducted security investigations of prospective employees. (Overholser 2933; Flory 10,252–255; Burge 11,011) Many credit

bureaus, including those owned by CBI, produced some personnel reports for customers in their local areas. (Tamalis 2531; Overholser 2933; King 3316–17; Burge 3883; CX 42a; CX 308j)

337. In 1970, RCC was the largest company in the sale of personnel reports. (King 3316–17)

338. Francis Smith and an official of Retail Credit denied that the Smith bureaus acquired by respondent produced personnel reports, claiming that at most they sold some consumer credit reports which may have been used for employment purposes. (F. Smith 272, 332; Aitken 10,697–702, [94] 10,869–74) It is clear from the record, however, that the credit bureaus acquired by respondent which are the subject of this proceeding, including those acquired from Smith, produced personnel reports which were distinguishable from, and more expensive than, credit reports, though these reports made up only a small part of the bureaus' business. CBDC, for example, sold 1,959 personnel reports for $10,195, or for an average price of $5.20, in 1970. Its updated file reports in that year, on the other hand, sold for an average price of $1.89. CB West Coast bureaus sold 623 personnel reports in 1970 for $4,060 or an average price of $6.52; its updated file reports in that year sold for an average price of $3.12. CB Portland's sales for 1970 are not available, but in 1969 it sold 1,000 personnel reports at an average price of $4.50. Its updated file reports in 1969 sold for an average price of $1.66. (CX 39c; CX 41a; CX 170b, h) The record does not disclose the content of these reports, the customers to whom they were sold, or the extent to which they were competitive with reports sold by respondent.

339. Deriving CB Portland's 1970 sales of personnel reports by applying a weighted average percentage based on its 1967 and 1969 sales of such reports to its 1970 total revenue, complaint counsel estimated that the 1970 total personnel reporting sales of the acquired firms was $18,400. (CPF 323) These sales amount to .05 to .06 percent of complaint counsel's estimated universe of personnel report sales in 1970. (F. 335) RCC's 1970 sales of personnel reports amounted to $12,817,000. (CX 43a)

C. Effects of the Acquisition

340. The record does not show that the acquired credit bureaus were direct, actual competitors of RCC in the sale of personnel reports. (F. 338)

341. The record does not show that the acquisition of the credit bureaus which are the subject of this proceeding significantly increased RCC's share of the personnel reporting market or concentration in that market. (F. 339) [95]

IX. RESPONDENT'S FAILING COMPANY DEFENSE

A. The Financial Condition of CB West Coast

342. In 1968, at the request of Donald Rutherford, then president of RCC's affiliated companies, Arthur Andersen & Company performed an audit of CB West Coast for the calendar year ending December 31, 1967. (Jones 9746–47) Similar audits were performed at the request of RCC for the calendar years ending December 31, 1968 and December 31, 1969. (Jones 9747–54)

343. The audit for the 1967 year showed the financial condition of CB West Coast to be as follows:

1. Current Assets	$734,451
1(a) Cash	89,453
2. Current Liabilities	3,084,345
2(a) Accounts Payable	747,727
3. Working Capital*	(2,349,894)
4. Long-Term Debt	1,369,215
5. Net Worth**	(1,070,863)
6. Net Profit (Loss)	(1,482,932)
6(a) Operating Profit (Loss)	(1,195,264)

* Working capital is Current Assets less Current Liabilities. (Mintz 8010; Jones 9768)

** Net worth is Total Assets less Total Liabilities. (Jones 9769)

(CX 261c–d)

344. Further, the audit showed that as of December 31, 1967, CB West Coast was unable to pay its bills as they came due as it owned [sic] over $747,000 in accounts payable, of which more than half were past due, but only had $89,000 in cash. (Jones 9769; CX 261c) [96]

345. The balance sheet also showed that by the end of December 1967, CB West Coast's debts were secured by substantially all of its assets, including accounts receivables, furniture and fixtures, equipment, cash surrender value on the life insurance of Francis Smith, the unamortized cost of credit reporting for collection, and the credit reporting files for collection. (CX 261g; Jones 9774–74a)

346. Under the terms of the agreement entered into in August 1968 between respondent and CB West Coast, CB West Coast was entitled to loans of up to $3.5 million, repayable with interest at the rate of 1 percent above the prime rate, in monthly installments until December 1979. In exchange, respondent received a pledge of all CB West Coast's common stock as security for the loan, and an option to acquire that stock in exchange for shares of RCC stock. (F. 62; RX

237d–f; RX 240; CX 562e) The loan was to be used for debt retirement, operating expenses, trade accounts payable, to pay off loans made by the U.S. National Bank of Oregon, and for completion of the data processing system which CB West Coast was then developing. (RX 237z18; F. Smith 295–96; CX 365i–j)

347. As of December 31, 1969, CB West Coast had received $3,300,000 under the loan agreement with RCC, and had been able to reduce its current liabilities substantially. However, according to the audit performed for that year by Arthur Andersen & Co., CB West Coast still had current liabilities in excess of its current assets, and its cash on hand was inadequate to satisfy outstanding accounts payable. The audit portrayed the financial condition of CB West Coast as follows:

1. Current Assets	$803,964
1(a) Cash	110,328
2. Current Liabilities	920,942
2(a) Accounts Payable	349,954
3. Working Capital	(116,978)
4. Long-Term Debt	4,426,163
5. Net Worth	(2,251,009)
6. Net Profit (Loss)	(1,183,101)
6(a) Operating Profit (Loss)	(789,485)

(CX 562b–c)

[97] 348. By December 31, 1969, CB West Coast had borrowed a total of $4,275,000 from respondent. (RX 235; Rutherford 13,260) The audit for that year conducted by Arthur Andersen & Co. portrayed the financial condition of the company as follows:

1. Current Assets	$750,524
1(a) Cash	51,979
2. Current Liabilities	1,113,776
2(a) Accounts Payable	589,839
3. Working Capital	(363,252)
4. Long-Term Debt	5,124,167
5. Net Worth	(3,703,623)
6. Net Profit (Loss)	(1,452,614)
6(a) Operating Profit (Loss)	(847,227)

(RX 235)

349. Based on his review of these certified financial statements, John R. Jones, certified public accountant and a partner with Arthur

Andersen & Co., who supervised the preparation of CB West Coast's 1967 audited financial statement and reviewed the 1968 and 1969 audited statements, concluded that CB West Coast was insolvent during the years 1967, 1968, and 1969. It was also his opinion that the CB West Coast was a "losing" company during this period since it continually sustained operating losses without reversal and, in particular, had doubled its negative net worth each year. (Jones 9780–94, 9899–9900)

350. Representatives of other companies who reviewed the financial condition of CB West Coast in 1967 and early 1968 in connection with possible purchase thereof also concluded that CB West Coast was insolvent, "in serious financial trouble" and headed towards business failure unless it received a substantial infusion of cash in the magnitude of "several million dollars." (Shea 5211–14; Shalleberger 7808–12, 7874; Mintz 7930–42, 8010; Rogers 9629–32) [98]

351. For at least three years prior to its 1967 fiscal year, CB West Coast had capitalized expenses incurred in the research and development of its computerized credit reporting system. In 1967, and thereafter until its acquisition by respondent in 1970, CB West Coast accounted for such costs by expensing them against current income in the year incurred. In the 1967 financial statement, prior years' research and development expenditures which had been capitalized, were written off and charged against retained earnings. (Briloff 15,291–292, 15,299; CX 261e, h) During that period, either of these approaches was acceptable and in accordance with generally accepted accounting procedures. (Jones 9794–98, 9817, 9924–28, 9939–48; Briloff 15,304–317; RX 235; CX 155; CX 261h; CX 562d)

352. The decision to expense or capitalize research and development costs is determined by the likelihood of their recoverability through future profitable operations. The expensing of CB West Coast's computerization research and development costs was considered warranted and proper under the circumstances by Mr. Jones (see F. 349) in light of the company's considerable debt and his assessment of the improbability that CB West Coast operations would allow recovery of those costs. (Jones 9771–9808, 9975–76)

353. Since 1970, the Financial Accounting Standards Board (associated with the American Institute of Certified Public Accountants) has determined that expensing of research and development costs, rather than capitalization, is the appropriate and acceptable method of accounting treatment. (Jones 9808–10)

354. CB West Coast's losses during the years 1967, 1968 and 1969 were due in large part to the cost of developing and installing its

computerized credit reporting system and of its acquisition in 1967 of credit bureaus in the San Francisco area. (F. 49; CX 158c; CX 261b; CX 526a; RX 235a)

355. Research and development expenditures associated with CB West Coast's automated credit reporting system were estimated by CB West Coast's management to be as follows:

1964	–	$ 100,000
1965	–	298,000
1966	–	685,000[99]
1967	–	1,025,000
1968	–	826,000
1969	–	619,000 (January through August only)
Total	–	$3,553,000

(CX 261z21; CX 301b; Briloff 15,291, 15,522–523)

356. Dr. Briloff, an accountant who testified as an expert witness on behalf of complaint counsel, stated that it would have been proper and in accordance with generally accepted accounting principles to capitalize expenditures for the computerized credit reporting system in the years 1967, 1968 and 1969 to the extent that the company could reasonably anticipate that expenditures for the system could be recovered from future revenues to accrue from the use of the system. (Briloff 15,327–330, 15,317–322)

357. Installation of the automated credit reporting system was begun in CB West Coast's San Francisco bureau in 1967 and completed in 1969. During the same period, the company's Portland area operations were computerized. (F. 47; Aitken 10,851–852; Rutherford 13,266–272) In 1968 and 1969, both RCC and CB West Coast anticipated that the company would have future profitable operations, and that RCC would be able to recover its investment in CB West Coast. (Jones 9897–99; CX 51, p. 14; CX 158d; CX 363z41a)

358. If research and development costs of the computerized reporting system had been capitalized in 1967, 1968 and 1969, CB West Coast's financial outlook would not have appeared as bleak as that portrayed in Findings 343–350. Complaint counsel estimated, using the procedures outlined by Dr. Briloff, that if this procedure had been followed, CB West Coast's financial statement would have shown the following approximate amounts:

	1967	*1968*	*1969**
Net Income (Loss)	(300,000)	(200,000)	(325,000)
Retained Earnings	585,000	382,000	140,000
Total Assets	5,600,000	6,150,000	6,592,000
Total Liabilities	5,000,000	5,750,000	6,434,000
Net Worth	600,000	400,000	158,000

* The full year's EDP expenditures are not stated in the record, although the first eight months' expenditures are. [100] The above amounts for 1969 reflect an estimated annual amount of EDP expenditures of $928,000, annualized based upon the $619,000 stated in the record for the first eight months of 1969.

(CPF 453; Briloff 15,357–368)

B. Other Prospective Purchasers

359. In 1967, CB West Coast sought to borrow funds from the United States National Bank of Oregon, which had been its principal source of financing since 1935. CB West Coast had already borrowed $433,000 from U.S. National, secured by CB West Coast's accounts receivable, a pledge of the equity in the real estate of Beri, Inc., the personal guarantees of Francis Smith and his wife, and a pledge of the equity in the real estate of both CB West Coast and Beri owned by Francis Smith and his wife in support of the guarantees. Although the U.S. National was willing to loan CB West Coast an additional $75,000, bringing its loan balance up to $508,000, to meet the company's "most pressing obligations," U.S. National advised CB West Coast that it did not intend to loan it any money beyond this amount. (RX 5; F. Smith 325–31; Bostrack 5276–85, 5293–5308, 5329–32, 5344–46)

360. During 1967 and 1968, CB West Coast made several unsuccessful attempts to secure additional working capital or a merger partner in order to allow the company to continue its automation project. For example, in the latter part of 1967, CB West Coast contacted Title Insurance & Trust Company of Los Angeles, California, to explore the possibility of obtaining financial assistance from it. The trust company was told that CB West Coast had spent in the neighborhood of $2 million to $2 1/2 million in automating credit bureaus in the San Francisco Bay area which had drained its working capital and necessitated borrowing from banks, and wanted to obtain from $2 million to $2 1/2 million from Title Insurance & Trust to pay off the bank loans, in order to complete the automation of the records in the Bay area, and to provide working capital to continue operations. After reviewing financial data furnished by CB West Coast, a trust company official concluded that it was not likely that Title Insurance & Trust could loan CB West Coast a sum in the neighborhood of $2 million [101] and get it "repaid in a reasonably

short time out of future earnings." Accordingly, he decided not to make a recommendation to the Title Insurance & Trust Company Board regarding an offer of financial assistance to CB West Coast. (Deatley 5123–34)

361. In 1967 or 1968, Francis Smith also approached the chairman of the board and chief executive officer of Dun & Bradstreet, Inc. ("D&B") to determine if D&B had any interest in acquiring CB West Coast. However, the chairman decided not to make any recommendations to the board regarding possible acquisition of CB West Coast, and Dun & Bradstreet neither offered to purchase CB West Coast nor offered it any financing. (Newman 7778–83)

362. In late 1967 or early 1968, R. Brookings Smith, the owner of the St. Louis credit bureau, requested Kuhn, Loeb and Co. to review the operations of CB West Coast in order to determine if it would be feasible to combine operations. (Shea 5200–03) Kuhn, Loeb reviewed financial statements of CB West Coast for the previous three years, and a Kuhn, Loeb partner and R. Brookings Smith visited the offices of CB West Coast in Salem, Oregon in early 1968. (Shea 5204–05) Based on this review of financial data and the visit to Salem, Kuhn, Loeb concluded that a combination between R. Brookings Smith and CB West Coast would not be prudent in view of the "poor financial condition" of both companies. (Shea 5212–14) Accordingly, the negotiations between R. Brookings Smith and CB West Coast were terminated. (F. Smith 285–86)

363. Blyth & Co.'s office in Portland, Oregon was contacted by Francis Smith in early 1967 for the purpose of determining whether Blyth could assist CB West Coast in raising the capital necessary to complete its automation program. (Cadenasso 5255–57) Later in 1967, Blyth & Co. brought CB West Coast to the attention of a representative of Metromedia, Inc. as a possible acquisition candidate. (Cadenasso 5258–59) Francis Smith met with representatives of Metromedia on at least two occasions, providing them with information regarding CB West Coast's need for capital and its present financial status. After reviewing the CB West Coast financial materials provided, Metromedia's vice president and controller concluded that the amount of money needed by CB West Coast exceeded Metromedia's capabilities and interests. [102] Accordingly, it was recommended to top management that Metromedia not pursue acquisition of CB West Coast. (F. Smith 297–98; Rogers 9625–29, 9632–34)

364. CB West Coast contacted Francis S. Levien but negotiations were dropped because CB West Coast believed that Levien and his

associates were not willing to provide the cash to pay off the creditors of CB West Coast and provide working capital. (F. Smith 299–300)

365. In January 1968, Francis Smith stated that because CB West Coast management believed that the company was eventually to be acquired by RCC, no real effort was made to refinance, and other firms interested in acquiring CB West Coast has been brushed off. (CX 360b) Nonetheless, three companies made offers to acquire CB West Coast prior to the consummation of the loan agreement and the grant of the option to RCC. (F. 366–367)

366. In late 1967 or early 1968, Computing & Software and Computer General Corporation both made offers to acquire CB West Coast through an exchange of stock. Francis Smith stated that these offers were not accepted because they would not have satisfied CB West Coast's need for cash. (F. Smith 300; CX 301d)

367. Computer Science Corporation, after conducting an investigation of CB West Coast in the summer of 1967, offered in October 1967 to purchase the company for $3 million in Computer Science Corporation stock. The offer was predicated on the basis that the outstanding liabilities of CB West Coast did not exceed tangible assets by more than $1,800,000. The offer further provided for a maximum payment of $500,000 in cash in lieu of an equivalent amount of stock. (CX 660) Computer Science Corporation also agreed to assume CB West Coast's liabilities. CB West Coast never formally rejected the offer. (Tr. 15,218–219) Francis Smith stated that the offer was not acceptable to him because it did not involve enough cash to pay off the company's outstanding liabilities on which he and his wife had given their personal guarantees. (F. Smith 300–01)

368. After consummation of the loan agreement with RCC in August 1968, CB West Coast had no further serious discussions with other companies concerning a loan or the possibility of acquisition. (CX 301e) [103]

Discussion

A. The Relevant Product Markets

A threshold issue in this case, as in all Section 7 cases, is the determination of the product dimensions of an effective area or areas of competition within which the legality of the challenged acquisitions must be tested. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 324 (1962).

The law in this regard is well established. The outer boundaries of a product market are determined by the product and its close

substitutes from the economic and functional points of view. Within this broad market, however, well-defined submarkets may exist which in themselves constitute product markets for Section 7 purposes. And, if there is a reasonable probability that the acquisition in question may substantially lessen competition in any economically significant submarket, the acquisition is proscribed by Section 7. *Brown Shoe Co.* v. *United States, supra,* at 325. There, the Court enumerated the criteria to be considered in determining submarkets:

> * * *The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors* * * [Footnote omitted.]

The presence of all of the seven enumerated factors is not required. *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 275, 276–277 (1964). I am also mindful that, in the final analysis, the relevant product market must be determined by the nature of the acquiring and acquired firms and by the nature of competition they face. Submarkets should not be contrived in disregard of a broader market which has economic significance. Nor should product markets be defined to encompass all substitute products in disregard of the congressional purpose in adopting the amended Section 7 and to obscure the true effect of a merger between sellers [104] of any one of the substitutable products. *Brown Shoe Co.* v. *United States, supra,* at 326–327; *United States* v. *Continental Can Co.,* 378 U.S. 441, 456–457 (1964); *United States* v. *Phillipsburg National Bank & Trust Co.,* 399 U.S. 350, 359–360 (1970). Furthermore, a cluster of products or services may constitute a valid product market in appropriate circumstances. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 356 (1963); *United States* v. *Grinnell Corp.,* 384 U.S. 563, 572–573 (1966). And in such cases, it is not required that there be complete functional interchangeability among the component products or services. *British Oxygen Co., Ltd.,* D. 8955, 3 Trade Reg. Rep. ¶21,063 at 20,908 (1975) [86 F.T.C. 1241]. It is also well settled that cross-elasticity of supply and interchangeability of production and distribution facilities are important considerations in defining product markets and can be determinative in appropriate circumstances. *Brown Shoe Co.* v. *United States, supra,* at 325; *The Budd Company,* D. 8848, 3 Trade Reg. Rep. ¶20,998 at 20,852–853 (1975) [86 F.T.C. 518]. With these controlling principles in mind, I now turn to the facts in this case.

It is the complaint counsel's position that each of the five

submarkets enumerated and described in Paragraphs 8 and 9 of the complaint constitutes a relevant product market in which to measure the effects of the challenged acquisitions. They are: (1) local credit reporting submarket; (2) non-local credit reporting submarket; (3) life and health insurance reporting submarket; (4) fire and casualty insurance reporting submarket; and (5) personnel reporting submarket. Respondent's position is essentially that (1) mortgage reports are separate and distinct from consumer credit reports, (2) the non-local credit reporting submarket is not a valid product market, (3) life and health insurance reporting does not constitute a single product market, (4) fire and casualty insurance reporting does not constitute a single product market, and (5) personnel reporting is not a valid product market. For the reasons explained hereinbelow, I have concluded that (1) the local credit reporting submarket is a valid product market and mortgage reports may be properly included in this market, (2) the non-local reporting submarket is not a valid product market for the purposes of this case, (3) the sale of credit reports to regional and national credit grantors constitutes a valid product market, (4) the life and health insurance reporting submarket constitutes [105] a valid product market, (5) the fire and casualty insurance reporting submarket constitutes a valid product market, and (6) the personnel reporting submarket is a valid product market.

(1) The Local Credit Reporting Submarket

Respondent does not seriously dispute the validity of the local credit reporting submarket but asserts that mortgage reports do not belong to the same market with consumer credit reports. Respondent's argument is without merit.

Credit reports are reports on the credit-worthiness of individuals and are furnished by credit bureaus to the various businesses (credit grantors) which need such information, including retail merchants, department stores, mail order houses, oil companies and credit card firms (also known as travel and entertainment or "T&E" firms), and banks and other lending institutions. (F. 85–86) Credit reports generally include four basic types of information: identification of the subject (*e.g.*, name, addresses, marital status), employment history, trade data and public record data (*e.g.*, judgments and bankruptcies). (F. 88)

A mortgage report is a special-purpose credit report and is furnished on individuals applying for mortgage loans from banks or other lending institutions. It includes generally the same types of information as in other credit reports. As a rule, a mortgage report

contains somewhat more detailed information bearing on the individual's financial responsibility, including income and net worth. (F. 92, 94) The fact that there is no valid distinction between credit reports and mortgage reports is graphically demonstrated by a comparison of respondent's own credit report forms and mortgage report forms. *Cf.* CX 30, pp. 9 and 21; RX 226; RX 227 and RX 228) However, due to the fact that a mortgage report generally contains more detailed information bearing on the subject's financial responsibility and the amount of credit transaction involved is much larger than conventional retail credit transactions, mortgage reports command a higher price than other credit reports (F. 97) [106]

Furthermore, the evidence is clear that mortgage reports are recognized as credit reports by the credit reporting industry. (F. 93) Respondent's own brochures describe mortgage reports as credit reports. (*E.g.*, CX 75a) Respondent's corporate officials conceded that reports for mortgage loan purposes are credit reports. (Rutherford 13,168; JX Burge Tr. 2298; JX Rutherford Dep. 250)

Also, the record indicates that there is no critical distinction between mortgage reports and other credit reports in the manner in which they are prepared. (F. 89, 95) Credit bureaus as well as RCA offices prepare and sell mortgage reports. Both credit bureaus and RCA serve the same or similar customers in providing mortgage reports. (F. 92, 98, 143) The critical fact in this connection is that these banks and lending institutions use mortgage reports for the purpose of making credit granting decisions. Although some firms use different employees or departments to prepare mortgage reports, this appears to be the exception rather than the rule. Typically, firms do not have a separate division or department that prepares only mortgage reports.[11] The record is clear that mortgage reports are not generally produced and sold by specialized vendors.

Respondent also attempts to distinguish mortgage reports from other credit reports on the ground that the former is an "investigative" report and the latter is not. (RPF 155–158) However, the record does not establish that a mortgage report as a rule requires a field investigation by an investigator. A substantial part of the task of preparing a mortgage report consists of transferring the pertinent information from a current file to the report, as is the case with all credit reports. In many cases, verification of information, to the extent necessary, is conducted by telephone or by mail. (RPF 158; [107] Daussin 1406; Tamalis 2727; Sasser 9287) The loan applicant is

[11] Respondent cites two such credit bureaus. (RPF 158) However, the witness from one of these bureaus testified that only some of his firm's mortgage reports are prepared by that division while other mortgage reports are prepared along with other credit reports. (T. Smith 1046)

sometimes interviewed. (Daussin 1406) The telephone verification procedure is also used in updating other credit reports. (F. 89) Although respondent emphasizes the "investigative" aspect of *its* mortgage reports for marketing purposes, the record is clear that mortgage reports are not "investigative" reports in the same sense that insurance reports are. With respect to the latter, field investigation comprises the heart of the reports. See p. 112, *infra.*

In view of the foregoing discussion, respondent's argument that the substantial price differential between mortgage reports and other credit reports requires the conclusion that mortgage reports and other credit reports constitute distinct and separate product markets for the purpose of this proceeding is not persuasive. See *Brown Shoe Co.* v. *United States, supra,* at 326. Credit bureaus sold mortgage reports and did so using the same data base and personnel used for the production and sale of other credit reports. Purchasers of mortgage reports turned to both credit bureaus and respondent, with the exception of those reports which required in-depth field investigation. (F. 98, 99) Thus, there was almost complete interchangeability of production and marketing facilities between mortgage reports and other credit reports. In view of the nature of the acquiring and acquired firms in this case and the nature of competition they face in the real world of commerce, I am persuaded that further fragmentation of the credit reporting market into mortgage reports and non-mortgage reports is unrealistic and unjustified. See *The Budd Company, supra,* at 20,852–53. In these circumstances, complete functional interchangeability is not required if both serve some important common end. In this case, mortgage reports, like other credit reports, are used for the purpose of making credit granting decisions. And both are offered by credit bureaus as a cluster of services to their customers. Accordingly, it is concluded that mortgage reports may be properly included within credit reports for the purposes of this case.

In this connection, respondent's argument that the use of "point scoring" by credit grantors is increasing to such an extent that point scoring should be included in the credit reporting market is not supported by the evidence. What is shown by the evidence is that point scoring, to [108] the extent it is used, is generally supplemental to credit reports and does not constitute a practical or functional substitute for credit reports. (F. 108) Point scoring does not compete with credit reports and is not properly includable in the product market.

(2) The Non-Local Credit Reporting Submarket

The validity of this product market is hotly contested by the parties. The ultimate issue is whether "non-local credit reporting" defined and described in Paragraph 8(b) of the complaint is an appropriate product market for the purposes of this case on the basis of the record evidence. My answer to this question is negative.

Paragraph 8(b) of the complaint defines this market as:

> the furnishing of credit information on local residents by consumer credit reporting agencies to credit grantors located outside the local metropolitan area, or on non-local residents to credit grantors located within the local metropolitan area, for use in determining whether to extend credit to consumer applicants.

Complaint counsel would include within this market: (1) sales of credit reports to regional and national credit grantors by straight brokerage organizations, such as Credit Bureau Reports ("CBR"); (2) direct sales of credit reports to regional and national credit grantors by credit bureau chains (such as respondent) or by independent (non-chain) credit bureaus or other credit reporting agencies; and (3) sales of credit reports by independent credit bureaus which also function as "brokers" through the use of the ACB inter-bureau coupon system. (CPF 254–259) In my view, complaint counsel's position cannot be squared with what is alleged in Paragraph 8(b) of the complaint.

First, the definition of "non-local credit reporting" given in Paragraph 8(b) of the complaint, when read in conjunction with the definition of "credit reporting agency" given in Paragraph 1(a) of the complaint, clearly excludes sales of credit reports by a straight brokerage organization, [109] such as CBR. Complaint counsel do not contend that CBR is a "consumer credit reporting agency." The record would not support such a contention. See CPF 255. Admittedly, CBR is not "a firm engaged in gathering, recording *and* disseminating information relative to the credit worthiness, financial responsibility, and paying habits of consumers" (Paragraph 1(a) of the complaint). The Paragraph 1(a) definition obviously covers credit bureaus. CBR is not a credit bureau by any stretch of the imagination. The same definitional problem arises with respect to CSI, which is a wholly-owned subsidiary of ACB, a trade association. See CPF 254 n.; CPF 255 n. Therefore, sales of credit reports by such straight brokers as CBR and CSI are not encompassed in "non-local credit reporting" as defined in the complaint.

Second, a similar definitional problem exists with respect to the so-called credit bureau-brokers. Brokered sales by these credit bureaus of credit reports obtained from other ACB member bureaus are

neither "furnishing of credit information on local residents to credit grantors located outside the local metropolitan area" nor furnishing of credit information on non-local residents to credit grantors located within the local metropolitan area" when the word "local" is read, as I do, to relate to the credit bureau-broker.

Third, with respect to direct sales of credit reports by credit bureau chains, such as RCC, or by an independent (non-chain) credit bureau, to regional and national credit grantors, that portion of such sales of credit reports on residents of an area where both the credit bureau and a credit decisionmaking unit of a regional or national credit grantor are located, is "local credit reporting" within the meaning of Paragraph 8(a) of the complaint and cannot be properly included in "non-local credit reporting" within the meaning of Paragraph 8(b) of the complaint.

Fourth, there is no direct competition among credit bureaus for the sale of the so-called non-local reports, except in a small number of localities which have more than one credit bureau with overlapping data base. (F. 240) There is no direct competition between brokerage operators (including both straight brokers, such as CBR, and credit bureau-brokers) on the one hand and credit bureaus on the other. Indeed, the record is clear that, [110] with respect to the vast majority of credit bureaus, sales to brokers constitute, as a practical matter, the only way in which their credit reports can be offered to satisfy the needs of regional and national credit grantors. Even the credit bureaus or credit bureau chains which do sell directly to regional and national credit grantors continue to market their reports through CBR as well. (F. 261–270) Perhaps most important, if any direct competition exists in the sale of the so-called non-local credit reports, it is at the *brokerage* level, namely, among the rival brokerage organization, such as CBR and CSI, and credit bureau-brokers.

Finally, the record clearly shows that the term "non-local credit reporting" is alien to most of the industry witnesses who testified in this case, with the exception of those who were exposed to that term during the *Texas* litigation. See *Credit Bureau Reports, Inc.* v. *Retail Credit Co.,* 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd* 476 F.2d 989 (5th Cir. 1973). Some witnesses, when pressed, appeared to equate "non-local reports" with "foreign reports," which includes antecedent reports,[12] which complaint counsel would exclude from their "non-local reporting submarket." See CPF 258 n. Yet, according to complaint counsel, antecedent reports account for the bulk of ACB

[12] See F. 191 n. for a description of antecedent reports.

coupon sales, the remainder (which complaint counsel now characterize as "brokerage") (CPF 258) being part of the non-local credit reporting market.[13]

For these reasons, it is determined that the non-local credit reporting market as defined in Paragraph 8(b) of the complaint does not constitute a valid product market.

My review of the record, however, convinces me that the sale of credit reports to the so-called regional and national credit grantors constitutes a valid product market for the purposes of this proceeding. For the lack of a [111] better term, I shall call this market "national account sales." The evidence is clear that regional and national credit grantors, such as national or regional retail store chains, mail order houses, oil companies and the T&E firms, constitute a distinct group of customers, separate and apart from local credit grantors. (F. 243) And the industry has generally recognized this as a separate market over the years. (F. 246–249) Clearly, this recognition has prompted independent local bureaus to support such national brokerage firms as CBR and CSI, which enables the local bureaus to reach indirectly the national and regional credit grantors. (F. 243, 254) Thus, this market is served by specialized vendors. During the last few years, a number of emerging credit bureau chains have begun to penetrate this market through direct sales. (F. 258) The evidence indicates, however, that even these bureau chains rely on CBR (F. 261) and that direct sales by all credit bureaus are dwarfed by their sales through CBR. (F. 262) There is also evidence indicating that the prices charged to a national and regional credit grantor are distinct from the prices charged to local credit grantors. (F. 250) And the sale of credit reports to national and regional credit grantors constitutes a significant economic activity. (F. 264–270) In my view, these factors are sufficient to establish the national account sales as a separate submarket in this proceeding.

I would include in the national account sales market (1) direct sales of credit reports to national and regional accounts by credit bureau chains and other independent credit bureaus, (2) sales of credit reports to national and regional accounts by brokers, such as CBR and CSI, and (3) sales of credit reports to national and regional accounts by ACB members through the use of the ACB coupon system. Although direct sales by credit bureau chains, brokered sales of credit reports produced by such chains and sales of credit reports through the use of ACB coupon system are, as noted earlier,

[13] In 1970, of the estimated ACB coupon sales of $10.6 million, an estimated $10 million was accounted for by antecedent reports, the remainder ($2.6 million) being what complaint counsel now call brokerage. (CPF 258 and n.)

complementary to each other from the standpoint of the producing credit bureaus, they nevertheless replace each other and are properly includable in the national account sales market. [112]

(3) The Life and Health Insurance Reporting Submarket

Complaint counsel include in this service market the furnishing of life and health insurance reports to insurance companies for use in determining insurability and rate classification. Life and health reports are investigative reports used for underwriting purposes by life and health insurance companies. (F. 254, 280) The primary objective of a life and health insurance report being assisting the insurance underwriter in evaluating the mortality or morbidity risk involved with respect to an individual applicant, verification of information given on the application form against in-file data is not sufficient as a rule. (F. 275, 297) Further investigation, usually through field interviews, of the state of health, medical history, occupational hazards, smoking and drinking habits, and other factors which bear on the applicant's mortality or morbidity is an essential input into a life or health report. The record indicates that this type of investigation is less important with respect to life insurance reports where the underwriter places reliance on actuarial tables as well as on the insurance report. (F. 277) In any event, credit bureaus, which as a rule do not maintain investigators and rely on telephone or letter inquiries for the preparation of updated reports, are not equipped to produce life and health insurance reports, and they do not produce or sell such reports. (F. 89, 90, 296–297, 302)

The production and sale of life and health reports is recognized as a separate service market. Respondent's internal documents and sales brochures clearly treat the sale of life insurance reports and health insurance reports as one marketing category. (F. 283) This is in accord with the testimony of witnesses from Hooper Holmes, Inc. and American Service Bureau, which are respondent's two principal competitors for the sale of life and health insurance reports. (F. 283) Two recognized insurance industry publications, *Best's Review* and the *National Underwriter,* also follow the distinction between life and health companies on the one hand and fire and casualty companies on the other. (F. 284) Life and health insurance reports are sold to distinct customers, namely, the life and health insurance companies. (F. 278) In the [113] final analysis, the life and health insurance reports are essentially reports on the individuals to be insured, while fire and casualty insurance reports are essentially reports on the property to be insured. These are valid distinctions for

Section 7 purposes. In my view, the record evidence clearly establishes that life and health reports alleged in the complaint constitute a valid product market for Section 7 purposes.

Respondent's argument is essentially that life insurance reports and health insurance reports have distinct characteristics and uses, that they are not functionally interchangeable and that, therefore, they do not belong to a single product market. However, complete interchangeability of use is not a *sine qua non* for a finding of a broader product market. *British Oxygen Co., Ltd., supra,* at 20,908. In the circumstances of this case, further fractionalization of the life and health report market is unwarranted.

Respondent further argues that the life and health companies have been increasingly relying on in-house investigation as a means of reducing their underwriting expenses, that an in-house investigation report constitutes a practical substitute for life and health insurance reports, and that, therefore, in-house reports must be included in this product market. This argument is without merit. Although the net result of in-house investigation reports, to the extent they are used exclusively, is to reduce the volume of life and health reports sold by life and health report firms, they do not "compete" with life and health reports. In-house investigation is simply another factor to be considered in evaluating the effect of the challenged acquisitions.

(4) The Fire and Casualty Insurance Reporting Submarket

The discussion related to the life and fire insurance reports hereinabove generally applies here as well. For example, respondent's internal documents and sales brochures treat the fire and casualty insurance reports as a single category, as distinguished from life and health reports. (F. 313) This is in accord with the testimony of an official of Hooper Holmes, Inc., a leading competitor in the sale of fire and casualty insurance reports. (F. 313) [114] Although fire insurance reports and casualty insurance reports are not functionally interchangeable and are sold to different customers in some instances, they are both essentially investigative reports on the property to be insured, as distinguished from credit reports which are reports on individuals who apply for credit. The record clearly establishes that the fire and casualty insurance reports constitute a valid product market for Section 7 purposes. Respondent's argument that fire and casualty reports belong to separate markets because fire insurance reports and casualty insurance reports are not functionally interchangeable is rejected for the

reasons discussed in connection with life and health insurance reports.

(5) The Personnel Reporting Submarket

Personnel reporting is defined as "the furnishing of personnel reports by credit reporting agencies and credit investigative agencies to employers to determine job applicants' employability" (Paragraph 8(e) of the complaint). The record shows that personnel reports are clearly distinguishable from credit reports and insurance reports in terms of characteristics and uses, customers and prices. (F. 326–328, 331–332) Respondent recognizes personnel reporting as a separate category. (F. 333) This is in accord with the testimony of industry witnesses. (F. 333) Respondent does not seriously dispute the validity of the personnel reporting market for Section 7 purposes,[14] but contends that it is not an economically significant market for the purposes of determining the effects of the credit bureau acquisitions challenged in this proceeding. (RPF 164) I agree with respondent's latter contention. [115]

B. The Relevant Geographic Markets

The guidelines for delineation of geographic markets have been laid down by the Supreme Court. The paramount purpose of defining a geographic market is, of course, to determine the geographic dimensions of an area of effective competition in which the legality of a given merger must be tested. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957); *Brown Shoe Co.* v. *United States, supra,* at 324. In this regard, "[t]he criteria to be used in determining the appropriate geographic markets are essentially similar to those used to determine the relevant product market." *Brown Shoe Co.* v. *United States, supra,* at 336. Thus, although the geographic market may be as large as the nation as a whole or as small as a single metropolitan area, the market selected in all cases must "both 'correspond to the commercial realities' of the industry and be economically significant," and not "formal" or "legalistic." *Id.* at 336–337. On the other hand, it is well recognized that a relevant geographic market seldom is susceptible of being defined precisely in meets and bounds. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). Some degree of artificiality and fuzziness are

[14] Respondent's argument (RPF 167) that personnel reports sold by credit bureaus did not satisfy the needs of employers is not supported by the evidence. (See F. 330, 336, 338) However, complaint counsel do not dispute respondent's position that, after the Fair Credit Reporting Act became effective in 1971, credit reporting agencies can no longer lawfully sell personnel reports based solely on in-file information. See RPF 166.

inherent in any attempt to delineate relevant geographic market. *United States* v. *Philadelphia National Bank, supra,* at 360 n. 37.

(1) The San Francisco Bay Area Market

Complaint counsel argue that the San Francisco Bay area, consisting of the nine counties of San Francisco, San Mateo, Santa Clara, Alameda, Marin, Solano, Napa, Sonoma and Contra Costa, all bordering on the San Francisco Bay, is a relevant geographic market for the purposes of determining the legality of respondent's January 1970 acquisition of CB West Coast. Respondent simply rests on alleged failure of proof on the part of complaint counsel; it has not proposed any alternative geographic market of its own. (RPF 192)

It is my determination that the record as a whole clearly supports complaint counsel's position. Most important, the record indicates a substantial agreement among credit grantors and credit reporting firms that [116] the nine-county area named by complaint counsel is an area of effective competition which corresponds to the commercial realities of these industries. (F. 138) It appears that most of the smaller credit bureaus had a limited data base covering a portion of the nine-county San Francisco Bay area, while TRW Credit Data, a leading credit reporting firm, considered its primary service area to encompass most, but not all (six of the nine), of the nine-county area, plus one other county bordering on the south of that area. (F. 139) However, Mr. Gauss, the marketing executive of TRW Credit Data, testified that the San Francisco marketing operations were confined to a nine-county toll-free service area in 1969. Although Mr. Gauss did not specifically identify the nine-county area, it is clear from the context that he was referring to the nine counties bordering on the San Francisco Bay. (Gauss 582–583; see CX 582f)

The data base of Credit Bureau Metro, Inc. ("CB Metro"), a subsidiary of CB West Coast, appeared to have encompassed three more counties (Santa Cruz, San Benito and Monterey) at the time of its acquisition by respondent. (F. 140) However, Mr. F. Smith, the controlling shareholder and president of CB West Coast, said that the bulk of CB Metro's business was in three counties (within the nine-county area) where the three largest cities are located. (F. 51) There is no evidence to show that, prior to the time of its acquisition by respondent, CB Metro actually sold credit reports in the twelve-county area in competition with credit bureau firms located in the nine-county area. Needless to say, the relevant geographic market is not determined by the historic scope of CB Metro's data base but by where the competition was. And, the record as a whole clearly establishes that, at the close of 1969, the nine-county San Francisco

Bay area was an area of effective competition from the standpoint of both the credit bureaus and their customers, the credit grantors.

(2) The Washington, D.C. Market

The record does not permit any serious dispute with respect to the validity of the Washington, D.C. market, which consists of the District of Columbia, Montgomery and Prince George's Counties in Maryland, Arlington and Fairfax Counties in Virginia, and the cities of Alexandria [117] and Falls Church in Virginia. Suffice it, that the record clearly shows that both the credit reporting firms and credit grantor customers regarded the Washington, D.C. metropolitan area as their trade area. (F. 214) Respondent's argument that, since the acquisition, the data base of CBDC, the acquired business, has been expanded into additional counties outside the Washington, D.C. metropolitan area is entirely irrelevant to the issue at hand. (RPF 188)

(3) The Portland, Oregon Market

Complaint counsel's Portland, Oregon market for local credit reporting consists of the city of Portland and Washington, Clackamas and Washington Counties, Oregon, and Clark County, Washington. (CPF 223) The record clearly shows that both credit bureaus and credit grantor customers recognized this area as their market. (F. 187) Respondent asserts that credit grantors in the Portland area purchased reports on Portland residents from Retail Credit Association of Portland ("CB Portland") and reports on residents outside of Portland either directly from Credit Bureau Metro of Portland ("CB Metro, Portland") or indirectly from CB Metro, Portland through CB Portland. (RPF 186) However, this argument strains the record. Although CB Portland's data base for residents within the city limits of Portland may have been more complete and "authoritative" than that for residents in the surrounding counties, the record shows that CB Portland's file coverage in fact encompassed the city of Portland and the surrounding counties. And, CB Metro, Portland's files encompassed a substantial portion of Multnomah County and the city of Portland, Oregon, in addition to Clackamas and Washington Counties, Oregon, and Clark County, Washington. (F. 187) Furthermore, Portland credit grantors regarded CB Metro, Portland as an alternative source of supply, and some in fact purchased credit reports on Portland residents from CB Metro, Portland for a time. (F. 197) Thus, the record as a whole supports the validity of the Portland, Oregon market.

(4) The Tacoma, Washington Market

Complaint counsel's Tacoma, Washington market for local credit reporting consists of Pierce County, Washington, which includes the city of Tacoma, while [118] respondent asserts that CB West Coast, the acquired firm, considered the marketing area of the Credit Bureau of Tacoma (owned by CB West Coast) to be the four-county area encompassing Pierce, Kitsap, Snohomish and King Counties, Washington. In my view, the record convincingly demonstrates that, at the time of the challenged acquisition, the trading area of the credit grantors in Tacoma was the city of Tacoma and the surrounding communities within Pierce County, Washington. (F. 204) Respondent's argument that Seattle and Tacoma, Washington are being merged into a single trade area is not supported by the evidence.

(5) The Pacific Northwest Market

In their proposed findings, complaint counsel took the position, for the first time in this proceeding, that the area surrounding every community in the Pacific Northwest (excluding Portland, Oregon and Tacoma, Washington) in which CB West Coast had a credit bureau, constitutes a relevant geographic market for local credit reporting. (CPF 238–241) This contention is rejected for the reason that complaint counsel effectively abandoned these communities by their pretrial submissions, with the exception of Salem, Oregon, Eugene, Oregon and Boise, Idaho. See complaint counsel's Response to Administrative Law Judge's Directive To Define Geographic Areas In Which Anti-competitive Effects Have Taken Place, March 15, 1974, pp. 2–3; Complaint Counsel's Trial Brief, April 15, 1974, p. 10. Complaint counsel cannot now be permitted, consistent with basic fairness, to resurrect them by posthearing advocacy.

With respect to Salem, Oregon, Eugene, Oregon and Boise, Idaho, the scant evidence in the record bearing on the issues is clearly inadequate to support an affirmative finding with respect to any of them. This is not a case where the record contains sufficient evidence with respect to a fair sample of all the areas in which the impact of the challenged merger is to be determined. *Cf. Brown Shoe Co.* v. *United States, supra,* at 339–341. On the contrary, the evidence in this case shows [119] that the structure of competition in particular markets varies substantially from one to the next so as to require a careful examination of individual markets.[14a] [120]

[14a] Even if each of Salem, Oregon, Eugene, Oregon and Boise, Idaho were accepted as valid geographic markets in local credit reporting, the record fails to show that respondent was a significant competitor of CB West Coast in

(Continued)

C. The Credit Reporting Industry and the Advent of Computerization

The credit reporting industry has been historically an atomistic one at the national level, credit bureaus in each trade area serving local credit grantors. The membership of ACB, the national trade association, grew from about 1,900 in 1958 to about 2,100 in 1970. Although the exact number of non-ACB credit bureaus is not known, it appears that their number probably approaches 400–500. (F. 104) At the local level, however, the credit reporting business has been highly concentrated in the hands of a few. This appears to have been the case especially in those areas where the credit granting merchants and financial institutions had formed their own credit bureaus on a non-profit basis. (F. 105) And, in areas where the ownership of such bureaus was held by a large number of merchants and banks, the success of competing bureaus was to a large extent limited by the merchant-owners' willingness to provide the competing bureaus with accounts receivable information and to patronize them. About the mid-60's, however, several embryonic regional credit bureau chains emerged, primarily through the merger route. (F. 109) This trend, following increasing computerization of credit operations of major local credit grantor customers, largely coincided with the increasing pressure for computerization of the credit bureaus serving them.

The response of ACB, the trade association, was to launch the CB-360 Project in 1965–1966 with a view toward devising a computer program and systems design which could be applied to credit reporting. This project was conceived and executed as a four-party joint venture involving IBM, ACB, Associated Credit Services of Houston and Chilton Corporation of Dallas. The "Credipak" system, a product of the CB-360 Project, was completed in April 1967 and was made available to all ACB members, including respondent. In the following years, ACS, Chilton and the Cook County Credit Bureau used the Credipak system, with some modifications and further refinements, to computerize the credit bureau operations in Dallas and Houston, Texas; Chicago, Illinois and Kansas City, Kansas. On the West Coast, CDC pioneered in credit bureau computerization in the Los Angeles area as early as 1965 with the encouragement and cooperation of area banks and merchants. In 1967, CB West [121]

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these areas. And the record does not show that respondent was either a perceived potential entrant or a likely potential entrant into any of the three areas under discussion. Finally, the record does not offer an evidentiary basis for concluding that a mere substitution of the CB West Coast bureaus in these areas by respondent is likely to lessen competition substantially, or tend to create a monopoly, in local credit reporting in any of them.

Coast computerized its operations in the San Francisco, California area, and christened its system ACROPAC. Respondent, not having been an initial participant in the CB-360 Project, investigated the ACROPAC system of CB West Coast as a possible alternative avenue to computerization during 1968 and decided to finance further refinements of ACROPAC under a $3.4 million loan agreement with CB West Coast in August 1968. Respondent was subsequently to acquire CB West Coast in its entirety, in early 1970. In mid-1970, respondent began computerization of its Southeastern operations using the ACROPAC system, and later began offering automated service contracts to independent local credit bureaus. The computerization of credit reporting also attracted TRW and Trans Union into the credit reporting industry in 1969. TRW took over CDC operations on the West Coast and Trans Union, the Cook County credit bureau in the Chicago area. In 1970 and thereafter, the computerized credit bureaus, including respondent, TRW, Credit Data, Trans Union, Chilton and ACS, began to offer automation service contracts to other credit bureaus, which enabled independent, local credit bureaus in large- and medium-sized urban areas to have their credit files computerized and connected to the contractor's central computer and to sell computerized credit reports to their own customers by accessing the computerized data bank. The contracting local bureaus retained the ownership to their credit files. (F. 121–134)

Thus, in the years following the challenged acquisitions, completely automated credit reporting became a reality in scattered metropolitan areas, utilizing multibureau hookups, visual display terminals (CRTs), autodata tape input, long distance transmission lines and customer terminal networks. (F. 129) As of 1975, however, computerized credit reporting networks remained essentially regional, with vast gaps in between. A few, including respondent, achieved multi-regional service capability, through a network of owned bureaus and service contract bureaus, encompassing portions of the West Coast, Pacific Northwest, Southwest and the Northeast. None, however, has yet attained a truly national capability. (F. 240)

The advent of progressive computerization has affected the credit reporting industry in several important respects. First, and most importantly, computerization made possible [122] improved service at lower costs to the credit grantor customers. It improved the quality of service in terms of speed, currency, and accuracy. The record, however, is not clear as to the prices charged credit grantors by local credit bureaus under service contracts, whereunder the local bureau sets its own prices. Second, and equally important, new competition has emerged among credit bureaus offering automated

service contracts, thus increasing the viability of medium- and small-size credit bureaus, which now can offer computerized credit reporting service to their credit grantor customers under service contracts. Finally, the ascendancy of national brokers, such as CBR, in the national account sales market is bound to decline significantly as regional and national credit grantors' ability to directly access the central data banks of computerized credit bureau chains increases with time. All of this, however, is not to say that manual bureaus will have no place in the credit reporting industry. It is fair to say that until such time as the existing computerized networks are substantially expanded and the incremental costs for automation becomes so low as to make their automation economically feasible, small manual bureaus will continue to serve their local credit grantor customers as in the past. In short, the advent of computerization has been largely beneficial to the credit reporting industry and its customers.

D. The Relevant Markets for Local Credit Reporting Were Highly Concentrated

(1) The San Francisco Bay Market

Prior to and at the time of respondent's acquisition of CB West Coast in January 1970, the local credit reporting market in the San Francisco Bay area was essentially a duopoly. In 1969, the year preceding the acquisition, CB Metro (CB West Coast's San Francisco area operation) was the dominant firm, followed by Credit Data (later TRW Credit Data). (F. 141, 144, 145) Although the record does not show respondent's precise market share, it appears that respondent's local credit reporting sales in this market in 1969 was relatively very small. (F. 144, 145) The two leading firms were both computerized. The record indicates that their computerization substantially improved the quality of service, including [123] speed of service and file coverage, and resulted in lower credit reporting costs to the credit grantors in the market. (F. 148)

(2) The Washington, D.C. Metropolitan Market

At the time of respondent's acquisition of CBDC in October 1970, the local credit reporting market in the Washington, D.C. metropolitan market was virtually a monopoly, CBDC having acquired Stone's Mercantile Agency, the other credit bureau, in late 1969. There were no independent credit bureaus in any of the suburban areas surrounding Washington, D.C. (CX 81b) Respondent had local offices located in Washington, D.C., Silver Spring and Suitland, Maryland

and Alexandria, Virginia, but its sales of credit reports could not be identified. (F. 216–218) In 1969, the year preceding respondent's acquisition of CBDC, CBDC accounted for about 57 percent of the identifiable sales in the market, and Stone's Mercantile Agency (acquired by CBDC in October 1969) accounted for about 43 percent. The record does not contain the local credit reporting volume of respondent in this market, but it was relatively small. (F. 221) All of the above three were manual bureaus.

(3) The Portland, Oregon Metropolitan Market

The local credit reporting market in this area was highly concentrated in 1969 and 1970. In 1969, the Retail Credit Association of Portland ("CB Portland"), a merchant-owned credit bureau, was the leading firm, with over 70 percent of the market. Credit Bureau Metro, Portland (CB West Coast's local operation) accounted for about 28 percent. (F. 191) RCA Portland's office had undetermined sales. Respondent acquired Credit Bureau Metro, Portland in January 1970 and CB Portland in January 1971. Thus, in 1971, respondent became a monopolist in this market.

(4) The Tacoma, Washington Market

The local credit reporting market in this area was a duopoly. In 1969 and 1970, the only two firms selling credit reports were Credit Bureau of Tacoma ("CB Tacoma") [124] (owned by CB West Coast) and respondent (RCA). Respondent's January 1970 acquisition of CB Tacoma thus turned this market into a monopoly. In 1969, CB Tacoma accounted for about 90 percent of the market, and respondent, for about 10 percent. (F. 210)

E. Elimination of Actual Competition

(1) The San Francisco Bay Area and Washington, D.C. Metropolitan Area Markets

Complaint counsel broadly contend that respondent was a significant actual competitor in the local credit reporting market in the San Francisco Bay area and Washington, D.C. metropolitan area markets because respondent sold credit reports, including mortgage reports, in these areas. The record does not show actual sales of credit reports by respondent for individual geographic markets, but respondent estimated that, on a national basis, its sales of local credit reports would be about 49 percent of its total sales. (CX 40) Complaint counsel have assumed in their proposed findings that the

49 percent ratio applies to each and every geographic market. (CPF 205 n., 206 n.) This is a questionable procedure. See *ITT Continental Baking Co.*, D. 7880, 3 Trade Reg. Rep. ¶20,783 (1974) [84 F.T.C. 1349]. The record strongly indicates that respondent's credit report sales ratio may vary widely from one area to the next, depending largely on whether CBI had a credit bureau in a particular locality. In those areas where CBI did not have an office, the ratio would depend on local competitive conditions and on how aggressively the manager of a particular local RCA or RCC office chose to promote the sale of credit reports. The record suggests strongly that the Washington, D.C. metropolitan area at least probably was among the low-ratio areas. (F. 218) In addition, complaint counsel have failed to point to any reliable evidence to challenge seriously respondent's assertion that its credit report sales in the two markets under discussion were nominal. For these reasons, it is determined that respondent was only a nominal actual competitor in local credit reporting in the San Francisco Bay and Washington, D.C. Metropolitan area markets. Thus, the record fails to show that respondent's acquisition of CB West Coast and CBDC eliminated substantial actual competition in local reporting in the San Francisco Bay and Washington, D.C. metropolitan area markets. Evidently anticipating a negative determination [125] on this issue, complaint counsel have primarily relied on the potential competition theory with respect to the two geographic markets under discussion.

The record, however, discloses a radically different picture with respect to the Tacoma, Washington and Portland, Oregon markets.

(2) The Tacoma, Washington Market

Several points stand out in this market. First, beginning in the mid-1960's, respondent aggressively promoted and successfully sold the so-called derogatory reports (or "derogs") to credit grantors. (F. 208) Respondent's derogatory report contained the basic information which appears in a regular credit report, with the exception of detailed trade data, and emphasized derogatory information on credit applicants, such as bankruptcies and collection agency referrals. Credit grantors evidently regarded derogs as a kind of short-form credit report. (F. 209)

Secondly, the evidence clearly shows that a number of major credit grantors regarded respondent as their alternative source of credit

information for credit decisionmaking purposes and in fact purchased substantial amounts of reports from respondent.[15] (F. 207) Thirdly, respondent had unique and current information on military personnel stationed at military bases in the Tacoma area. (F. 209) Finally, there was no merchant-owned credit bureau in Tacoma; the Tacoma Credit Bureau was owned by CB West Coast. In short, the local credit grantors, having found that respondent had essentially the same kind of information the local credit bureau offered and respondent often had better information on military personnel, used respondent as an alternative supply source of credit information for credit decisionmaking purposes. Thus, [126] the record convincingly demonstrates that respondent was a substantial actual competitor in local credit reporting in the Tacoma, Washington market.

The record further shows that the Tacoma, Washington market was highly concentrated. Although the record does not contain precise market share information, it is safe to conclude that respondent's credit report sales in Tacoma probably amounted to more than 49 percent of its total sales. On the basis of the 49 percent ratio, respondent's credit report sales in this market accounted for about 10 percent of the market, the remainder being the share of the acquired bureau. (F. 210) In other words, respondent's absorption of CB West Coast eliminated the only and substantial competitor, turning Tacoma into a virtual monopoly market. This is a clear violation of Section 7.

(3) The Portland, Oregon Market

Respondent's status in Portland, Oregon at the time of its acquisition of CB West Coast is not clear. The record indicates that respondent through RCA had marketed derogatory reports in this market as well, but there is no evidence that the sale of such reports continued into 1969–1970. (F. 194) However, the record shows that CB Metro, Portland was a significant actual competitor of the merchant-owned CB Portland when the latter credit bureau was acquired by respondent in January 1971. (F. 190) One gets a distinct impression from the record that, although the scope and depth of data on residents of Portland city proper in CB Metro, Portland's hands were not up to the level of CB Portland, the CB West Coast bureau constantly attempted to improve and expand its data on Portland residents. And it is clear that CB Metro, Portland (acquired by respondent) had adequate information on suburban residents. (F.

[15] This fact is dramatically demonstrated by the fact that the Tacoma store of Rhodes Liberty House, a Pacific Northwest department store chain, switched to respondent when Tacoma Credit Bureau raised its prices in 1969. (F. 209)

190) In short, respondent was clearly much more than a standby source of credit reports and was realistically an alternative source of such reports to the credit grantors in the Portland, Oregon metropolitan market at the time of its acquisition of CB Portland.

The record further shows that the Portland, Oregon market was highly concentrated at the time of respondent's acquisition of CB Portland. (F. 192) As the result of its January 1970 acquisition of CB West Coast, respondent [127] obtained a substantial market position in the market, the other firm (CB Portland) accounting for about 72 percent of the market. (F. 191) Through its January 1971 acquisition of CB Portland, its only competitor, respondent obtained a virtual monopoly position in local credit reporting in the Portland, Oregon market. Therefore, respondent's 1971 acquisition of CB Portland was a clear violation of Section 7.[16]

F. Retail Credit Company as a Potential Entrant

In a nutshell, the basic rationale of potential competition theory in a merger context is that, in an oligopoly where the market is not sufficiently competitive to enforce competitive behavior on existing sellers, potential competition need be preserved as a means of disciplining the price and output decisions of the in-market firms while potential entrants are poised on the edge of the market (the "edge effect") and also as a source of new competition and future deconcentration when a potential entrant does enter the market (the "future competition").[17] [128] Before complaint counsel can properly invoke the potential competition theory, they must establish the truth of assumptions underlying the foregoing proposition. They

[16] In this connection, respondent's argument that the complaint did not specifically challenge its 1971 acquisition of CB Portland is without merit. A fair reading of Paragraphs 10, 12 and 15 of the complaint admits no other conclusion. Although Paragraph 15 does not in terms allege elimination of actual competition with respect to the acquisition of CB Portland, that acquisition was specifically challenged in complaint Paragraphs 10 and 12. Furthermore, there cannot be any dispute that the case was tried on the theory that respondent's CB Portland acquisition was a horizontal acquisition which eliminated a substantial actual competition in local reporting in the Portland, Oregon market.

[17] See Wilcox, *Competition and Monopoly in American Industry*, 7–8 (TNEC Monograph No. 41, 1940); Bain, *Price Theory*, 213–215 (1952); *Barriers To New Competition*, 2–4 203–204 (1956); *Industrial Organization*, 274–275 (2d ed. 1968); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *F.T.C.* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972); *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973); Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," 78 Harv. L. Rev. 1313, 1362–1386 (1965) ("Turner"); Brodley, "Oligopoly Power Under the Sherman and Clayton Acts - From Economic Theory to Legal Policy," 19 Stanford L. Rev. 285, 354–361 (1967)("Brodley"); Berger and Petersen, "Conglomerate Mergers and Criteria for Defining Potential Entrants," 15 Antitrust Bull. 489 (1970); Dunfee and Stern, "Potential Competition Theory as an Antimerger Tool Under Section 7 of the Clayton Act: A Decision Model," 69 Northwestern L. Rev. 821 (1975); Markovits, "Potential Competition, Limit Price Theory, and the Legality of Horizontal and Conglomerate Mergers Under the American Antitrust Laws," 1975 Wis. L. Rev. 658; Areeda, *Antitrust Analysis* 665–666 (2d ed. 1974).

must show that (1) the market is highly concentrated (or trending toward high concentration),[18] (2) the firm in question was a likely potential entrant, (3) the firm was a recognized potential entrant,[19] and (4) there were substantial (but not insurmountable) entry barriers.[20] The potentiality may be determined by objective evidence showing that (1) the firm possessed the essential capabilities and resources necessary to effect a successful entry,[21] and (2) the market offered special incentives [129] to the firm because of proximity of the product or geographic market involved.[22] The potentiality may also be shown by subjective evidence regarding the corporate intent or state of mind of the firm with respect to entry.[23] Also, in order to establish the removal of an edge effect, it must be shown that the firm was recognized as a potential entrant by the in-market firms.[24] Finally, the substantiality of potential competition [130] eliminated may be shown by (1) that the firm was the best placed potential entrant, (2) that the firm was one of a small number of potential

[18] See n. 17, *supra; Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974).

[19] *United States* v. *El Paso Natural Gas Co.*, *supra*, at 659, 661–662; *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1256 (C.D. Cal. 1973), *aff'd*, 418 U.S. 906 (1974).

[20] Turner, *supra* n. 17, at 1365; *Beatrice Foods Co.*, 81 F.T.C. 481, 526–533 (1972); Markovits, "Potential Competition, Limit Price Theory, and the Legality of Horizontal and Conglomerate Mergers Under the American Antitrust Laws," *supra* n. 17, at 664–665.

[21] *United States* v. *Penn-Olin Chemical Co.*, *supra* at 174–175; *Ford Motor Co.* v. *United States*, *supra*, at 566; *United States* v. *Falstaff Brewing Co.*, *supra*, at 533.

[22] *United States* v. *El Paso Natural Gas Co.*, *supra*, at 660; *F.T.C.* v. *Procter & Gamble Co.*, *supra*, at 572–574; *United States* v. *Penn-Olin Chemical Co.*, *supra*, at 174–175.

[23] See *United States* v. *Penn-Olin Chemical Co.*, *supra*, at 175; *Ford Motor Co.* v. *United States*, *supra*, at 565–566; *F.T.C.* v. *Procter & Gamble Co.*, *supra*, at 574, 580–581; *United States* v. *Falstaff Brewing Co.*, *supra*, at 528–529.

However, subjective evidence is treacherous ground for a fact-finder because of the difficulties and uncertainities inherent in adjudicative determination of such an elusive fact. Furthermore, in a case where the charge is elimination of the edge effect and the firm was a recognized potential entrant, the subjective intent of the firm is immaterial. In a case where the charge is elimination of future competition, the corporate intent, whether affirmative or negative, is not frozen in concrete but is subject to change. Also, the record in this case contains striking examples where respondent's attempts to expand into the non-mortgage credit reporting market in the West Coast ended in failure. (F. 32, 194) In my view, subjective evidence does not provide a reliable ground on which to base a prediction as to whether the given acquisition is likely to lessen competition substantially.

See *United States* v. *Falstaff Brewing Corp.*, *supra*, at 533–536; Brodley, *supra* n. 17, at 357–358; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), 246 F. Supp. 917 (D. Del. 1965), *aff'd by an equally divided court*, 389 U.S. 308 (1967).

[24] *United States* v. *El Paso Natural Gas Co.*, *supra*, at 659, 661–662. This may be established by evidence showing contemporaneous perception by the oligopolists of the firm's capabilities and resources necessary for entry and/or by evidence showing that their price or output decisions were in some manner influenced by the presence of the firm on the edge of the market.

Recently, several commentators have questioned the empirical validity of the limit price theory and suggested further normative refinements of criteria for potential competition analysis. See Dunfee and Stern, "Potential Competition Theory as an Antimerger Tool Under Section 7 of the Clayton Act: A Decision Model," *supra* n. 17, at 835–866; Markovits, "Potential Competition, Limit Price Theory, and the Legality of Horizontal and Conglomerate Mergers Under the American Antitrust Laws," *supra* n. 17, at 666–695. Although I agree in principle that the determination of a firm's potential entrant status should not be the end of legal analysis in potential competition cases and a further refinement of additional criteria may aid the trier of fact in his ultimate determination of the legality of a given merger, such refinements should be kept within practical and workable bounds in the interest of judicial efficiency and predictability. *Cf.* Posner, "Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions," 75 Columbia L. Rev. 282, 323 (1975).

entrants, and (3) any other circumstances that may show the uniqueness of the firm as a potential entrant.[25] In this context, an unsuccessful entrant may nevertheless remain a potential entrant or cease to be one, as the case may be, depending on the circumstances which aborted the initial attempt for entry or some subsequent occurrence which significantly affects the potentiality. Generally speaking, an unsuccessful entrant remains a potential entrant in the absence of [131] evidence showing that (1) the entry barriers are, or have since become, prohibitive or insurmountable,[26] or (2) the unsuccessful entry conclusively demonstrated that the firm was deficient in some key capabilities or resources essential to a successful entry.

Finally, it should be noted here that, with respect to the "future competition" argument, the fact that a firm in fact entered a market by an acquisition has little bearing on the issue of whether the firm would have entered on its own, or through a toehold acquisition, but for the merger. *Ekco Products Co.* v. *FTC*, 347 F.2d 745, 752 (7th Cir. 1965).

Ultimately, however, the factfinder must assess the probable effect of the challenged merger and determine whether the merger is likely to lessen competition substantially in violation of Section 7. This judgment calls for a careful, overall reckoning of the kind and degree of the record evidence as a whole bearing on the key issues discussed hereinabove. I have discussed the potential competition theory at some length because complaint counsel have invoked this theory in connection with several product and geographic markets in this case.

(1) The San Francisco Bay Market

Complaint counsel contend that (a) the local credit reporting market was highly concentrated, (b) there were substantial entry barriers, (c) respondent possessed the requisite capabilities and resources, (d) respondent was one of a limited number of likely potential entrants, (e) respondent was perceived as a likely potential entrant, and (f) the elimination of potential competition by respondent's January 1970 acquisition of CB Metro of California, is likely to result in substantial lessening of competition.

There cannot be serious dispute about the fact that the record evidence as a whole shows that respondent was a potential entrant into the San Francisco Bay market. [132] (F. 181) Respondent had an office in the market, which sold appreciable amounts of credit

[25] Turner, *supra* n. 17, at 1362–1379; Berger & Peterson, "Conglomerate Mergers and Criteria for Defining Potential Entrants," 15 Antitrust Bull. 489, 495 (1970).

[26] This would of course render the potential competition theory inapplicable. See Turner, *supra* n. 17, at 1365.

reports, including mortgage reports. Respondent desired to improve its market position there. Respondent possessed the necessary capabilities and resources, to enter that market on its own.

I have carefully considered the fact that respondent was, albeit minimal, an actual competitor in this market. Ordinarily, this fact would strongly argue for the inference that respondent remained a significant potential entrant in that market. However, in the instant case, two factors relative to conditions of entry, which were rather unique to this market, raise serious doubt as to whether respondent was a *likely* potential entrant into the San Francisco market at the time of its acquisition of CB West Coast. The two factors are credit grantor cooperation and the presence of two computerized competitors in the market.

The record is clear that a successful entry is impossible without the cooperation of credit grantors in providing accounts receivable information to the proposed entrant and purchasing credit reports from it. (F. 178) The testimony on the question whether a prospective entrant could have secured sufficient credit grantor cooperation in this market in early 1970 is inconclusive. Most of the principal customers in this market had computerized their credit operations. There were two computerized credit bureaus at the end of 1969–Credit Bureau Metro (the acquired firm) and Credit Data Corporation (later TRW Credit Data Division). Complaint counsel agree that competition between the two computerized bureaus "improved the quality of service, including speed of service and file coverage, and resulted in lower credit reporting costs to credit grantors in the Bay Area." (CPF 211) Against this background, there is credible evidence which tends to show that the credit grantors were well pleased with the service they were receiving from the existing credit bureaus and would not have been receptive to providing their accounts receivable information to a third computerized bureau, unless the latter offered substantially lower prices or some new service which would have filled a serious gap in the service to the credit grantors. (F. 179) Furthermore, the record is clear that computer capability was essential to a successful entry into this market. (F. 178) At the time of its acquisition of CB West Coast, respondent did [133] not possess computer capability, although it had access to technical information related to CB Metro's programs and system designs. It was not until mid-1970 that respondent began to computerize its Atlanta headquarters operations, utilizing essentially what it learned from CB West Coast, albeit after significant modifications and improvements. (F. 180) These circumstances raise serious doubt as to the likelihood of respondent's entry. In these circumstances, how attractive a

market was the San Francisco Bay area for respondent to enter de novo in 1969–1970, the time of the challenged acquisition?[27] In fact, the record shows that Computing & Software Corporation (later Cordura Corporation), of Los Angeles, California, considered a direct entry into northern California in 1972, but decided against it because there was little hope of getting a decent return on such investment since two computerized credit bureaus were already in operation in the San Francisco area. (Sasser 9228–9729) Moreover, there is no credible evidence of subjective intent in the record to show that respondent in fact intended nevertheless to expand its non-mortgage credit reporting in this market in the near future. For these reasons, complaint counsel's contention that respondent was a *likely* potential entrant is not persuasive. Therefore, it is determined that the evidence fails to establish that, but for the challenged acquisition, respondent would have entered de novo, or by a toehold acquisition, into this market. Thus, the record does not provide a basis for the "future competition" aspect of potential competition theory.

Secondly, complaint counsel's argument that respondent was a perceived or recognized potential entrant is not supported by the record. The evidence relied on by complaint counsel consists of opinion testimony based on hindsight, not on contemporaneous perception. (CPF 326) Elimination of the "edge effect" cannot rationally be based on hindsight for the edge effect assumes [134] contemporaneous recognition of a likely potential entrant which may serve to discipline the price and output decisions of the oligopolists prior to the acquisition-entry challenged herein.

Furthermore, complaint counsel's contention that respondent was one of a limited number of likely potential entrants into the San Francisco Bay market is not supported by the evidence. In conclusion, the record fails to establish by a preponderance of credible evidence that respondent's acquisition of CB West Coast is likely to lessen competition substantially in local credit reporting in the San Francisco Bay market.

(2) The Washington, D.C. Metropolitan Market

Complaint counsel contend that (1) the local credit reporting in the Washington, D.C. metropolitan market was highly concentrated, (2) there were substantial entry barriers, (3) respondent possessed the requisite capabilities and resources, (4) respondent was one of a limited number of potential entrants, (5) respondent was perceived

[27] In this connection, complaint counsel's reliance on evidence indicating that, *after* respondent acquired CB West Coast, it regarded the San Francisco Bay area (or the Los Angeles, California or Portland, Oregon, for that matter) as a suitable site for a regional computer center, is misplaced. (CPF 341–342)

as a likely potential entrant by the suppliers and purchasers of credit reports in the market, and (6) respondent's October 1970 acquisition of CBDC eliminated substantial potential competition. I agree with these propositions with the exception of (5).

The high concentration prevailing in this market in 1970 is beyond dispute. (F. 222) The parties agree that entry barriers were substantial. However, respondent argues that chances of obtaining the cooperation of the major merchants in the area, who were also owners of the credit bureau, would have been "very unlikely." (RPF 243) First, the record shows that the Stone's Mercantile Agency, an independent local credit reporting firm, successfully operated for many years until it was sold in 1969 to the merchant-owned CBDC after the death of its owner. (F. 229) Second, the bulk of CBDC's some 1,000 subscribing merchants had no ownership interest in CBDC. The ownership of CBDC was held by 25 firms. (F. 68, 228) In these circumstances, respondent's credit-grantor-cooperation argument with respect to this market boils down to a variation of its argument that a de novo entry "would have been extremely difficult, time consuming and very costly." (RPF 243) [135] However, it is well settled that that fact, even if true, does not save the acquisition if it is shown that the alleged potential entrant otherwise possessed the requisite capabilities and resources to enter the market on its own, as is the case here. See *F.T.C.* v. *Procter & Gamble Co., supra,* at 574; *Ford Motor Co.* v. *United States, supra,* at 566. *Cf. Brown Shoe Co.* v. *United States, supra,* at 345 n. 72.

The record is clear that respondent possessed ample capabilities and resources to enter this market. Respondent was a well-established and leading credit bureau chain in the country. (F. 150–156) It had abundant financial resources to expand. By the middle of 1970 (before its CBDC acquisition), respondent began to market computerized credit reports from its regional centers in the Southeast. (F. 158)

The record is also clear that respondent was a most likely potential entrant into this market. Prior to October 1970 (the date of its CBDC acquisition), respondent had established important credit bureau locations in the Middle Atlantic and Northeastern States, including the Carolinas, New Jersey, New York, Connecticut and Massachusetts. See Appendix A. In terms of market proximity, therefore, the Washington, D.C. market was sufficiently near respondent's existing credit bureaus as well as to the Southeast, respondent's historic market. I am not aware of any potential competition case, nor has respondent pointed to any case, which would equate "proximity" or "nearness" to "contiguity." Market proximity is a matter of degree, and, with respect to the Washington,

D.C. market, I find that it was sufficiently near respondent's existing credit bureau locations. Respondent's potentiality in terms of subjective evidence is convincing. Respondent was keenly aware of the Southeast and Northeast areas as the prime area into which it is destined to expand and rightfully seize the leadership position.[28] (F. 226, 227) Thus, [136] the conclusion is inescapable that, but for the acquisition, respondent would have entered the Washington, D.C. market in some way. And, the record shows that, among the small number of firms which may be said to have possessed the requisite capabilities, respondent was in a unique position in terms of market proximity, historic capabilities and incentives.

From the foregoing discussions, it is concluded that respondent was a likely potential entrant and that its acquisition of CBDC eliminated substantial potential competition in local credit reporting in the Washington, D.C. metropolitan market in violation of Section 7. [137]

G. Structure of the National Account Sales Market

The record does not permit a market structure analysis of the national account sales market based on reliable market share data. For example, the record does not show a reliable universe for this

[28] A vivid revelation of this thinking is contained in a speech, given in October 1967, by D. Rutherford, then president of CBI (Retail Credit Company's credit bureau chain), before a group of CBI managers. Under the title "Reason For Being," Mr. Rutherford emphasized the importance of planning, and reviewed CBI's past growth and charted its future direction. An outline of Mr. Rutherford's speech reads in part:

"Historically, the explanation for CBI [Retailers] as one of the Affiliated Companies to Retail Credit Company has been -

1. Deeper penetration into Credit Reporting Market.
   A. Specialization
   B. Local Market
2. Broaden base for parent company.
3. Increased profits and earnings.

We have accepted this rule and pointed to our increases in revenue, acquisitions, increased profits• • •

"CHANGES IN OUR BUSINESS: Credit bureaus have clearly indicated the possibilities of much faster growth because of 'threat of automation' - acquisitions in 1967 and 1968 to accelerate. We added $1,250,000 in 1967 in acquired business. *Control of both Southeast and Northeast are possible if we are bold enough and smart enough. Few have the money to do the job necessary in building regional computer centers - we do and can!* " [Emphasis added]

(CX 168a, c)

In February 1971, W. L. Burge, president and chief executive officer of Retail Credit Company, reported the progress of his company to the Boston Security Analysts Society, Inc. He said in part:

"While reaching these new peaks, 1970 was important also for Retail Credit Company for the several acquisitions we made and the fruition of other expansion plans which insure accelerated growth in the next few years."

• • • • • • • •

"Our company is a pioneer in the multi-bureau operational field in that we own 120 bureaus."

"We have a range of bureaus beginning in the Southeast, where Atlanta and Miami are principal locations, up through the Middle Atlantic States, where we have a key position in New Jersey. And with the acquisition of Washington, D.C. in 1970, it adds to our strength in that Middle Atlantic area."

(CX 167d, f; also see CX 81c; White 11,579–580; Rutherford 13,092–095)

market. It does not show the true magnitude of direct sales by credit bureau chains. Nor does it show the portion of ACB coupon sales accounted for by sales to national and regional credit grantors.

However, what evidence there is in the record is sufficient to make out broad contours of this market. For example, it is beyond dispute that CBR for some years [138] has remained by far the dominant firm. (F. 264) With the emergence of a few regional credit bureau chains toward the late 1960's and early 1970's, CBR's dominant position has suffered a significant erosion as the chain bureaus began to sell directly to national and regional credit grantors. (F. 258, 260, 264) These bureau chains, however, continued to do business with CBR. It is safe to conclude that, at the time of the challenged acquisitions, CBR maintained its dominant position in this market.

The record evidence also offers some hope for further erosion of CBR's dominant market position in the years to come. First is the emergence of rival brokerage organizations, such as CSI and ACB coupon brokers. (F. 255) Secondly, there is evidence indicating that the advent of computerized credit reporting since the late 1960's has enabled regional and national credit grantors to obtain credit information directly from automated credit bureaus through the use of computer terminals, thus bypassing brokers, such as CBR. (F. 260) The direct-dialing capabilities of the national and regional credit grantors is likely to be further enhanced as more independent local bureaus subscribe to the automated service contract systems now being offered by a number of computerized credit bureau chains, including respondent. (F. 131–133) To the extent that increases in direct sales by credit bureau chains tend to erode CBR's dominant position, the effect of the challenged acquisitions will be procompetitive as far as the national sales market is concerned. In my view, protection of a market leader from the incidence of new competition is clearly repugnant to the basic purposes of Section 7. For these reasons, it is concluded that the record evidence fails to show any likelihood of substantial lessening of competition in the national account sales market as a result of the challenged acquisition.

H. The Probable Effect of the Acquisitions in the Personnel Reporting Market

The personnel reporting market is characterized by a large number of firms. Complaint counsel admit that the bulk of credit bureaus in the nation prepare and sell personnel reports. (CPF 321) It is true that respondent [139] is probably the largest firm in this national market, accounting for some 35–40 percent of that market

by its own estimate. (Burge 3878) However complaint counsel agree that the challenged acquisitions only marginally increased respondent's personnel reporting market share (adding about 0.05 percent). (CPF 422; F. 339) Thus, the effect of the challenged acquisitions in the personnel reporting market is clearly *de minimis*.

I. The Probable Effect of the Acquisitions in the Life and Health Insurance Reporting Market and the Fire and Casualty Insurance Reporting Market

The record indicates that the life and health insurance reporting market was highly concentrated. Respondent was by far the leading firm. (F. 289) Complaint counsel contend that all of the acquired firms were potential entrants into this highly concentrated market as a group and that their absorption by respondent eliminated significant potential competition. This proposition is not supported by the evidence.

The record is clear that credit bureaus do not produce or sell life or health insurance reports. If complaint counsel's argument is that the acquired firms were potential entrants by virtue of the Texas Pilot Project (F. 294), then each of the credit bureaus in the nation, numbering well over 2,000, is also a potential entrant. In these circumstances, an argument that respondent's absorption of the acquired firms is likely to lessen competition substantially in the life and health insurance reporting market is patently untenable. In any event, in my view the Texas Pilot Project convincingly demonstrated that conventional credit bureaus lacked the requisite capabilities to produce insurance reports as we know them. (F. 295–296) Therefore, complaint counsel's argument that respondent's absorption of formerly independent credit bureaus sufficiently undermined a potential base for a new national brokerage operation offering insurance reports in competition with respondent is not persuasive.

With respect to fire and casualty insurance reports, the record is clear that none of the acquired firms whose acquisition by respondent is challenged in this proceeding prepared or sold fire and casualty insurance reports. [140] Indeed, the record does not show that credit bureaus routinely prepare and sell fire and casualty reports or that they are capable of doing so.

In short, the record does not establish a Section 7 violation in either the life and health insurance report market or the fire and casualty insurance report market.

J. Evidentiary Rulings

A few remarks may be in order with respect to several evidentiary matters. First, complaint counsel placed considerable reliance on the result of a Section 6 survey of the credit bureaus in 130 cities with 1960 Census population of 100,000 or more. This survey was conducted in 1970–1972. I received into evidence responding firms' answers, or summaries thereof, to certain questions given in Section 6(b) special reports without requiring complaint counsel to produce witnesses from these firms. These answers are essentially limited to identification and classification information and other data of statistical nature involving credit reporting sales of responding firms. Other Section 6(b) report answers, such as those listing "competitors" and their estimated "market shares," were excluded. Respondent's request to require the Commission to conduct a Section 6(b) survey of the credit reporting industry during the litigation for the purpose of securing data related to computerized credit reporting sales was denied. However, I authorized an alternative survey by the use of some 90 subpoenas duces tecum, and certain statistical summaries of information based on the subpoena returns were received in evidence without requiring respondent to produce witnesses from some 80 responding firms. Complaint counsel were given an opportunity to spot check the accuracy of these subpoena responses against underlying data secured from selected firms. In my view, although both the Section 6 survey and the respondent's survey are less than perfect in their conception and execution, reception of statistical information based on these surveys is justified for the purpose for which it was used. There was a clear necessity in both cases. There were also sufficient circumstantial guarantees of trustworthiness. The statistical information thus received was used for purposes of market structure analysis. [141]

Second, complaint counsel have extensively relied on estimates in their presentation of market structure analyses. With respect to the various estimates respondent furnished the Commission during the pre-complaint investigation, it is my view that the government has a right to rely on such estimates regarding respondent's own operations. It was incumbent upon respondent to correct or improve such estimates or otherwise offer more accurate data regarding its own business at trial if such data were available. With respect to the various estimates regarding the business of other firms (including estimates given in the two surveys discussed hereinabove), due regard was given to the nature and extent of such estimates, the basis for such estimates and the methodology used in arriving at such estimates. In all instances and to the extent relied on for the purposes of formulating findings for this initial decision, I was

satisfied that the estimated data were reliable for the purpose for which they were being used. With respect to estimated market share information relied on in my findings, it is my opinion that they were sufficiently reliable for the purpose of reconstructing an overview of the relevant markets and drawing certain broad inferences for the purpose of evaluating the probable impact of the challenged acquisitions. In view of the finite resources at the Government's command and the shortness of life, technical perfection and mathematical exactitude in these matters are seldom attainable. In my view, the market share information contained in this initial decision, although far from perfect and precise, is sufficiently reliable to permit an informed and reasoned judgment with respect to the degree of concentration and approximate market shares of the leading firms in the relevant markets. With respect to certain proposed projections of estimated data, I have disregarded them, or gave them little weight, except in those instances where evidence showed that prudent businessmen in the credit reporting industry would base their day-to-day business decisions on the kind of information under consideration. *See Brown Shoe Co.* v. *United States, supra,* at 341–342 n. 69; *Avnet,* 82 F.T.C. 391, 465 (1973), *aff'd,* 511 F.2d 70 (7th Cir. 1975); *Papercraft Corp.,* 78 F.T.C. 1352, 1405–1406 (1971), *aff'd,* 472 F.2d 927 (7th Cir. 1973); *British Oxygen Co., Ltd., supra,* at 20,922.

Third, certain excerpts from the deposition and trial transcripts, including statements of respondent's corporate officials, from the so-called Texas litigation (*Credit* [142] *Bureau Reports, Inc.* v. *Retail Credit Co.,* 358 F. Supp. 780 (S.D. Texas 1971)) were received in evidence as party admissions. See 5 J. Wigmore, Evidence §1416 (3d ed. 1940); Rule 801(d)(2)(A), Federal Rules of Evidence. Respondent was permitted to designate additional portions of such transcripts for the purpose of explaining or qualifying or contradicting the portions designated by complaint counsel. See 4 J. Wigmore, Evidence §1059, (Chadbourne Rev. 1972). These excerpts are contained in a joint exhibit prepared at my direction. Complaint counsel's position is that such party admissions, once received, stand on an equal footing as any other testimony given at the trial of this case. Although there appear to be some authority supporting complaint counsel's position, I have limited the use of the Joint Exhibit evidence to corroboration purposes in preparing the findings. This decision is mainly based on my strong belief that in cases where, as here, the same witnesses were called and gave extensive testimony, sole reliance on their prior testimony is unwise and should be avoided for the purpose of

formulating substantive findings. Complaint counsel were put on notice of my reservations in this regard during the hearing.

Fourth, a substantial amount of post-acquisition evidence was received into evidence. I am keenly aware of certain pitfalls accompanying post-acquisition evidence. In cases where, as here, respondent or the acquired firm had a leading market position, the danger of possible dissimulation of market power is a real one. However, I was persuaded that a proper evaluation of the advent of computerization, which began toward the late 1960's and progressed apace in the early 1970's in the credit reporting industry, was essential for a functional view of the industry and a true understanding of the industry's present and its future which Section 7 demands.

Finally, out of a desire to obviate the possible need for a remand hearing directed to the issue of relief, respondent was given every reasonable opportunity to develop a record bearing on that issue. Although the bulk of such evidence consists of self-serving opinion testimony of respondent's corporate officials, such opinion testimony was duly considered by me to the extent that I believed the underlying reasons given for certain conclusionary opinions to be cogent and reasonable and [143] appeared to comport with other evidence in the record. In those instances where such opinion testimony amounted to nothing more than self-serving speculation, I have not given it any weight.

K. Failing Company Defense

Respondent has invoked the failing company doctrine in its defense with respect to its January 1970 acquisition of CB West Coast. It is well established that Congress intended to exempt from the proscription of Section 7 an acquisition of a "failing company" within the meaning of *International Shoe Co.* v. *F.T.C.*, 280 U.S. 291 (1930). *Brown Shoe Co.* v. *United States, supra,* at 315–320 n. 34. In *International Shoe Co., supra,* the evidence showed that the financial resources of the acquired firm were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure and that there was no other prospective purchaser. 280 U.S. at 302. In *Citizen's Publishing Co.* v. *United States,* 394 U.S. 131, 138 (1969), the Court, in view of "the broad experience of the business community since 1930, the year when the *International Shoe* case was decided, that companies reorganized through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act often emerged as strong competitive companies," stated that the "prospects of reorganization [of the acquired firm] would have had to

be dim or nonexistent to make the failing company doctrine applicable. . . ." *Id.*, at 138.[29] And the burden of proving that the [144] conditions of the failing company doctrine have been satisfied is upon the proponent. *Id.*, at 138–139. In this case, respondent has not satisfied that burden.

First, although the evidence shows that CB West Coast suffered substantial operating losses in the years since 1967 and may have approached insolvency in the commercial sense during those years, the record does not establish that CB West Coast's resources were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure. Clearly, the question of commercial insolvency is primarily an accounting question. However, the question whether a firm's resources are so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure is much more than an accounting question. It calls for an overall assessment of the firm's basic capabilities and resources and their immediate-term prospects from a business point of view. It also calls for a judgment regarding the prospect of the firm's rehabilitation, through corporate financing, increased efficiencies or otherwise.

In the instant case, the main reason for CB West Coast's adverse financial position was that the firm, beginning in 1964, expended large sums of money in connection with its pioneering computerization program, which did not produce an immediate return, and incurred substantial expenditures for the 1967 acquisitions of credit bureaus located in San Francisco, Oakland and San Jose, California. (F. 354) These investments, whatever their effects may have been on the company's current [145] financial statements, clearly promised substantial financial rewards in the near future. In any event, those financial setbacks do not appear to have adversely affected CB West Coast's leading market position in the San Francisco Bay area and other areas in the Pacific Northwest.[30] (F. 144–145, 210) Furthermore, the evidence shows that CB West Coast, since these acquisition

[29] I reject respondent's argument that the Court, in the *Citizen's Publishing* case, did not mean to prescribe the "dim reorganization prospect" requirement as a condition of the failing company doctrine. I also disagree, with all due respect, with the court in *United States* v. *MPM, Inc.*, 1975 Trade Cases ¶60,312 (D. Colo. 1975), at 66,246–66,247, to the extent that that decision may be read to reject "dim reorganization prospect" as a third requirement. In my view, the explicit language of the Court in the *Citizen's Publishing* case, when read in context, clearly indicates that the Court intended to prescribe a further condition based on the post-*International Shoe* experience as viewed by the Court in 1969. *Accord, United States Steel Corp.* v. *FTC*, 426 F.2d 592, 609 (6th Cir. 1970). Moreover, it is difficult to discern any logical relationship between the "only available purchaser" requirement and the "dim reorganization" requirement which may rationally make one dependent on the other. And if the Court meant to regard the two as alternative requirements, it would have said so. In any event, in the instant case, respondent has failed to satisfy either requirement.

[30] There is substantial evidence which tends to show that both CB West Coast and respondent anticipated CB West Coast's computerized credit reporting system to become profitable by the end of 1969 or soon thereafter. (F. 357)

discussions between it and respondent began in early 1968, desired to be acquired by respondent in some manner, and, consequently, "did not make a real effort to refinance" and that there may have been other firms which were interested in extending aid to CB West Coast. (CX 360b) These circumstances are clearly inconsistent with a finding that CB West Coast's resources were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure.[31]

Second, the record shows that a number of firms other than respondent expressed a serious interest in acquiring CB West Coast and several firms in fact made acquisition offers, which CB West Coast found unacceptable for one reason or another. Respondent concedes that, at the time of its consummation of the loan agreement with CB West Coast in August 1968, three firm exchange-of-stock offers had been made to CB West Coast. (RPF 362–363; F. 366, 367) Clearly, the evidence does not permit a conclusion that there was no other prospective purchaser in this case.

Third, there is no credible evidence in the record to show that CB West Coast's reorganization prospects, through receivership or Chapters X or XI of the Bankruptcy Act, were dim or nonexistent. Indeed, there is no evidence to show that CB West Coast ever seriously considered such a prospect. [146]

For all these reasons, respondent's failing company defense with respect to its acquisition of CB West Coast is rejected.

L. Violation of Section 5 of the Federal Trade Commission Act

Complaint counsel correctly argue that an acquisition which is found to be in violation of Section 7 of the Clayton Act also constitutes a violation of Section 5 of the Federal Trade Commission Act. *Golden Grain Macaroni Co.* v. *F.T.C.*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *Stanley Works* v. *F.T.C.*, 469 F.2d 498, 499 n. 2 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973). Therefore, respondent's acquisitions, to the extent they are found to be in violation of Section 7 of the Clayton Act, also constitute violations of Section 5 of the Federal Trade Commission Act. Complaint counsel, however, have not sought any relief specifically grounded on Section 5 violations.

M. Relief

It is now axiomatic that if the proscribed anti-competitive effect is

[31] Also, there is some evidence that CB West Coast's true financial condition was not as desperate as respondent contends. (F. 358)

found to exist in any one of the relevant markets, the acquisition is unlawful under Section 7. *Brown Shoe Co.* v. *United States, supra,* at 325. It is equally well settled that the normal remedy in cases where Section 7 violation is found is the divestiture of what was unlawfully acquired. Indeed, divestiture is the remedy prescribed by Section 11(b) of the Clayton Act. And complete divestiture is "peculiarly appropriate" in cases of stock acquisitions which violate Section 7. *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 328 (1961). And, the enforcement agency's panoply of remedial sanctions includes the power to ban unauthorized acquisitions in the future as well as other ancillary measures reasonably calculated to restore competition in the relevant markets. *F.T.C.* v. *Dean Foods Co.,* 384 U.S. 597, 606–607 n. 5, 609 n. 9 (1966); *Luria Bros. & Co.,* v. *F.T.C.,* 389 F.2d 847, 865 (3rd Cir. 1968), *cert. denied,* 393 U.S. 829 (1968); *Abex Corp.* v. *F.T.C.,* 420 F.2d 928, 933 (6th Cir. 1970), *cert. denied,* 400 U.S. 865 (1970); *Ford Motor Co.* v. *United States,* [147] *supra,* at 571–578; *OKC Corp.* v. *F.T.C.,* 455 F.2d 1159 (10th Cir. 1972); *Avnet, Inc.* v. *F.T.C., supra.* This is not to say that divestiture is an automatic sanction, mechanically invoked in merger cases. In cases where several equally effective remedies are available short of a complete divestiture, a due regard should be given to the preservation of substantial efficiencies or important benefits to the consumer in the choice of an appropriate remedy.

Applying the above guidelines to the instant case, it is determined that respondent should be required to divest the credit reporting business acquired as the result of its acquisitions of CB West Coast, CBDC and CB Portland, with the exception of the bureau operations in northern California in and around the San Francisco Bay market.

The law is clear that my determination that respondent's acquisition of CB West Coast had the statutorily proscribed effect in local credit reporting in the Tacoma, Washington market renders that acquisition unlawful in its entirety. However, I am persuaded that, in the circumstances of this case, respondent should be permitted to retain the acquired business in northern California, including the San Francisco Bay area market. First, I have determined that respondent's CB West Coast acquisition did not have the unlawful effect in the San Francisco Bay market. Second, the record as a whole clearly shows that, in terms of credit reporting, the San Francisco Bay area is a separate trade area distinct from any of the markets in the Pacific Northwest. *Cf. Brown Shoe Co.* v. *United States, supra,* at 337 n. 65. Third, I have not found any persuasive evidence that divestiture of the acquired credit reporting business in northern California, including the San Francisco Bay

market, is necessary to restore competition fully in the Tacoma, Washington or Portland, Oregon markets or that the business to be divested should include the northern California operations in order to remain a viable entity after divestiture. Lastly, there is some evidence that respondent's substitution for the financially ailing CB West Coast may be producing substantial benefits to the credit granting customers in the northern California area in improved service and expanded data base. [148]

With respect to the remainder of credit reporting operations acquired from CB West Coast, I have determined that divestiture of credit reporting business acquired from CB West Coast in the entire Pacific Northwest and CB Portland as a unit is necessary in order fully to restore competition in the Tacoma, Washington and the Portland, Oregon markets and to insure the viability of the divested business. *Cf. OKC Corp.* v. *F.T.C., supra.* There is another important consideration. A package encompassing the entire Pacific Northwest region is likely to enhance materially the salability of the business to be divested, thus insuring a speedy implementation of the remedy and an early and full restoration of competition in the Tacoma, Washington market as well as the Portland, Oregon market. This is a legitimate consideration, reasonably calculated to bring about a full and speedy restoration of competition in the relevant markets as to which a violation is found, in view of the long delays experienced in implementing the divestiture provisions in a number of recent Section 7 proceedings before the Commission. *E.g., Kennecott Copper Corp.,* D. 8765 [78 F.T.C. 744]; *Papercraft Corp.,* D. 8779 [78 F.T.C. 1353; *modified,* 79 F.T.C. 420].

Respondent's argument that divestiture of any of the acquired businesses would have significant anti-competitive effects is not only wholly self-serving but also devoid of evidentiary support and is rejected. Despite its surface plausibility, the argument essentially boils down to a contention that it needs the acquired businesses in order to maintain its leading market position in the post-acquisition markets where computerized credit reporting plays an important role. This argument is largely based on self-serving opinion testimony of respondent's corporate officials. In any event, this argument is invalid as a matter of law. *See United States* v. *Phillips Petroleum Co., supra,* at 1238. The situation at hand is clearly distinguishable from *Litton Industries, Inc.,* D. 8778, 3 Trade Reg. Rep. ¶20,854 (1975) [85 F.T.C. 333], where the evidence clearly showed that the relevant market (office electric typewriters) was a quasi-monopoly dominated by IBM and there was convincing evidence to show that the divestiture requirement would probably

result in a total exit of the acquiring firm under the order from the industry because of mounting, heavy losses.

I am also persuaded that a 10-year national moratorium on further credit bureau acquisitions by respondent is [149] clearly required. The record clearly demonstrates respondent's proclivity for acquisitions. (Appendix A) The record also shows that the credit reporting industry, once atomistic, has been perceptively moving toward increasing concentration at the national level, with increasing number of high concentrations at the local and regional levels. (F. 109) Furthermore, the advent of computerization has enabled small, local credit reporting firms to remain viable, independent entities offering computerized service to their customers under the automated service contract system. Preservation of small, independent local business units is an important goal of Section 7. *Brown Shoe Co.* v. *United States, supra,* at 315–316.

Finally, I see no reason why respondent should not be allowed to compete for automated service contracts with any of the purchasers of the divested business if that is the route they choose. However, such service contracts should be open to competitive proposals by all vendors.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent.

2. On or about January 2, 1970, respondent acquired substantially all of the stock of Credit Bureaus, Inc. of Salem, Oregon (CB West Coast). On or about October 29, 1970, respondent acquired the business and assets of the Credit Bureau, Inc. of Washington, D.C. (CBDC). On or about January 6, 1971, respondent acquired the credit reporting business and assets of the Retail Credit Association of Portland, Oregon, Inc. (CB Portland).

3. At all times relevant to this proceeding, respondent and each of the acquired businesses described in 2 above were engaged in commerce within the meaning of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act.

4. For the purposes of assessing the legality of the acquisitions described in 2 above under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, the appropriate lines of commerce are [150] local credit reporting, national account sales, personnel reporting, life and health insurance reporting, and fire and casualty insurance reporting.

5. The appropriate sections of the country within which to test the effect of the challenged acquisitions are the San Francisco Bay

area, the Portland, Oregon area, the Tacoma, Washington area, and the Washington, D.C. area, with respect to local credit reporting. The appropriate section of the country with respect to national account sales, personnel reporting, life and health insurance reporting is the United States as a whole.

6. Prior to and at the time of the acquisitions, respondent was a substantial actual competitor in local credit reporting of (a) CB West Coast in the Tacoma, Washington market, and (b) CB Portland in the Portland, Oregon market.

7. The acquisitions eliminated the substantial competition in local credit reporting between respondent and CB West Coast in the Tacoma, Washington market, and between respondent and CB Portland in the Portland, Oregon market, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

8. Prior to and at the time of the acquisitions, respondent was a significant potential competitor of CBDC in local credit reporting in the Washington, D.C. market.

9. The acquisition of CBDC by respondent eliminated significant potential competition in local reporting in the Washington, D.C. market, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

10. Divestiture of the credit reporting business acquired in the Washington, D.C. market as a result of respondent's acquisition of CBDC and of the credit reporting business acquired in the States of Oregon, Washington and Idaho as the result of respondent's acquisitions of CB West Coast and CB Portland is both necessary and appropriate to restore competition in the relevant markets. A 10-year prohibition of any acquisition by respondent of any credit reporting business in the United States, except [151] with a prior approval of the Federal Trade Commission, is both necessary and appropriate in the circumstances of this case.

11. The complaint should be dismissed in all other respects.

ORDER

I

It is ordered, That respondent, Retail Credit Company (hereinafter "Retail Credit"), a corporation, and its successors and assigns, shall divest all stock, assets, properties, rights and privileges and interests of whatever nature, tangible and intangible, acquired by Retail Credit as the result of its acquisitions of stock or assets of Credit Bureaus, Inc., of Salem, Oregon ("CB West Coast"), The Credit Bureau of Washington, D.C. ("CBDC") and Retail Credit Association

of Portland, Oregon, Inc. ("CB Portland") (hereinafter sometimes designated as "the acquired firms"), together with all additions and improvements to the acquired firms which have been added since the acquisitions of such firms. Such divestiture shall include the removal from all manual and computerized records of respondent all credit information obtained as a result of the acquisitions, and all additions and improvements to the acquired firms' credit information added since [152] the acquisitions, *provided, however,* that Retail Credit shall be permitted to retain credit reporting and related assets and business it acquired from CB West Coast and located in the State of California, including all additions and improvements thereto since the acquisition. Any assets or properties of any acquired firm required to be divested that have been substantially disposed of or commingled with Retail Credit's assets or properties since acquisition, including computerized credit files, shall be restored or recreated prior to divestiture and included in the assets and properties to be divested. Such divestiture shall be absolute and shall be accomplished no later than one year from the date this order shall become final.

II

It is further ordered, That the divestitures required by Paragraph I of this order shall result in the transfer of assets and businesses to be divested to purchasers as going business and as viable concerns engaged in the gathering and reporting of credit information on individuals to business firms. The assets and business pertaining to CB West Coast and CB Portland required to be divested shall be divested as one or more units and shall not be transferred, directly or indirectly, to the purchaser of the assets and [153] business pertaining to CBDC. Each such divestiture shall be subject to prior approval by the Federal Trade Commission.

III

It is further ordered, That the divestitures required by Paragraphs I and II of this order shall not be effected, directly or indirectly, to any person who is an officer, director, employee or agent of, or otherwise under the control or influence of, Retail Credit, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding stock of Retail Credit.

IV

Pending completion of such divestitures, Retail Credit shall not

commingle any assets, properties, financing, business or operations of any acquired assets and business required to be divested with its own, and shall take no steps to impair or otherwise adversely affect the economic, competitive and financial strength of any business required to be divested.

V

It is further ordered, That Retail Credit shall make no acquisition, directly or indirectly, of any concern, or any interest in any concern which is engaged in the [154] business of gathering and reporting credit information on individuals or business firms, until the divestitures required by this order shall have been completed.

VI

It is further ordered, That for a period of ten (10) years from the date of approval of the last divestiture required by this order, Retail Credit shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of, any concern engaged in the gathering and reporting of credit information on individuals to business firms in the United States, nor shall Retail Credit enter into any arrangement with any such concern by which Retail Credit obtains the market share, in whole or in part, of such concern.

VII

Nothing contained in this order shall be construed to prohibit Retail Credit from bidding for an automation service contract in competition with other firms offering automation service contracts, with any purchaser of any business divested pursuant to this order, *provided, however,* [155] that respondent shall not enter into a management contract with any such divested business for a period of ten (10) years from the date of its divestiture sale.

VIII

It is further ordered, That within thirty days from the effective date of this order and every thirty days thereafter until divestiture is accomplished, Retail Credit shall submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which Retail Credit intends to comply, is complying, or has complied with the order. All compliance reports shall include, among other things that are from time to time required, (a) the steps taken

to accomplish the required divestiture; and (b) copies of all documents, reports, memoranda, communications and correspondence concerning or relating to the divestiture.

With respect to Paragraph VI of this order, Retail Credit shall on the first anniversary date of the effective date of Paragraph VI and each anniversary date thereafter until the ten (10) year period shall have expired, submit a report, in writing, listing all acquisitions or mergers made by it, the date of each such acquisition or merger, [156] the products involved and such additional information as may from time to time be required by the Federal Trade Commission.

IX

It is further ordered, That Retail Credit shall notify the Commission at least thirty (30) days prior to any proposed change which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a corporate successor.

Appendix A

During the period January 1960-January 1971, RCC/CBI acquired credit bureaus located in the following cities and states (not including its CB West Coast bureaus):

Bureau Location	Approximate Date of Acquisition
Martinsburg, W. Va.	Jan. 1960
Winter Haven, Fla.	Mar. 1960
Albany, N.Y. (2 bureaus)	Apr. 1960
Tupelo, Miss.	May 1960
Greer, S.C.	July 1960
Orlando, Fla.	Oct. 1960
West Palm Beach, Fla.	Nov. 1962
Rockville Center (Huntington Station), N.Y.	May 1963
Ft. Lauderdale, Fla.	Aug. 1963
Natchez, Miss.	July 1964
Winter Haven, Fla.	Oct. 1964
Elizabeth City, N.C.	Mar. 1965
New London, Conn.	Feb. 1966
Clearwater, Fla.	Feb. 1966
Atlanta, Ga.	Apr. 1966
Lawrenceville, Ga.	Apr. 1966

Bureau Location	Approximate Date of Acquisition
North Adams, Mass.	June 1966
Ft. Myers, Fla.	Aug. 1966
Raleigh, N.C.	Aug. 1966
Columbia, Tenn.	Sept. 1966
Oxford, Miss.	Dec. 1966
Beacon, N.Y.	Apr. 1967
Sanford, Fla.	May 1967
Delray Beach, Fla.	Aug. 1967
Goldsboro, N.C.	Sept. 1967
Savannah, Ga.	Sept. 1967
Bridgeport, Conn. (2 bureaus)	Oct. 1967
New Brunswick, N.J.	Feb. 1967
Toms River, N.J.	Feb. 1967
Plainfield, N.J.	Feb. 1967
Asbury Park, N.J.	Mar. 1967
Forrest Park, Ga.	June 1967
Lumberton, N.C.	Feb. 1968
Pomona, Calif.	May 1968
Bay St. Louis, Miss.	Jan. 1969
Florence, S.C.	Mar. 1969
Kinston, N.C.	Nov. 1969
Walnut Creek, Calif.	Jan. 1970
Muncie, Ind.	Mar. 1970
Troy, N.Y.	Mar. 1970
Muncie, Ind. (Delaware County)	June 1970
Atlantic City, N.J.	July 1970
Bridgeton, N.J.	July 1970
Wildwood, N.J.	July 1970
Sonoma, Calif.	Sept. 1970
Washington, D.C.	Oct. 1970
Bellflower, Calif.	Dec. 1970
Santa Rosa, Calif.	1970
Portland, Ore.	Jan. 1971

(CX 44a, b, d; CX 74a–d; CX 379e–g)

Credit bureaus acquired by RCC/CBI through its January 1970 acquisition of CB West Coast included the following:

Bureaus

Albany, Ore.
Beaverton, Ore.
Bend, Ore.
Boise, Idaho
Bremerton, Wash.
Medford, Ore.
Mountain Home, Idaho
Namapa, Idaho
Newport, Ore.
Oakland, Calif.

Brookings, Ore.
Caldwell, Idaho
Coos Bay, Ore.
Coquille, Ore.
Corvallis, Ore.
Dallas, Ore.
Eugene, Ore.
Everette, Wash.
Florence, Ore.
Fremont, Calif.
Gilroy, Calif.
Grants Pass, Ore.
Hayward, Calif.
Hillsboro, Ore.
Hood River, Ore.
Lebanon, Ore.
McMinnville, Ore.
Ontario, Ore.
Oregon City, Ore.
Payette, Idaho
Pendleton, Ore.
Portland, Ore.
Puyallup, Wash.
Redmond, Ore.
Renton, Wash.
Salem, Ore.
San Francisco, Calif.
San Jose, Calif.
Springfield, Ore.
Tacoma, Wash.
The Dalles, Ore.
Tillamook, Ore.
Vancouver, Wash.
Weiser, Idaho

(CX 379f, g)

OPINION OF THE COMMISSION

BY DOLE, *Commissioner:*

The complaint in this case charged respondent Retail Credit Company, now known as Equifax, Inc., with violating Section 7 of the Clayton Act (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by reason of its acquisitions of Credit Bureaus, Inc., Salem, Oregon ("CB West Coast") in January 1970, of the Credit Bureau, Inc., Washington, D.C. ("CBDC") in October 1970, and of the credit reporting assets of the Retail Credit Association of Portland, Oregon, Inc. ("CB Portland") in January 1971. The complaint alleged that these acquisitions would have the probable effect of substantially lessening competition in the "credit reporting" product market and various product submarkets both in the United States as a whole and in several sections of the country, including Washington, D.C.; the San Francisco Bay area; Portland, Oregon; Tacoma, Washington; and other metropolitan areas in the Pacific Northwest.

After a lengthy hearing on the merits, Administrative Law Judge ("ALJ") Montgomery K. Hyun entered a decision finding that the acquisition of CBDC eliminated respondent as a substantial potential competitor in the Washington, D.C. local credit reporting market; the acquisition of CB Portland eliminated respondent as a substantial actual competitor in the Portland, Oregon local credit reporting market; and the acquisition of [2] CB West Coast eliminated respondent as a substantial actual competitor in the Tacoma,

Washington local credit reporting market. Rejecting the remaining complaint allegations, he ordered a partial divestiture of CB West Coast and a total divestiture of both CBDC and the acquired assets of CB Portland. The case is now before the Commission on cross appeals filed by complaint counsel and respondent.[1]

I. Respondent's Business

Respondent began operations in Atlanta, Georgia, in 1899 as a credit bureau. Directly or through its subsidiaries, Equifax now furnishes financial and credit reports to various business enterprises that wish to evaluate the financial reputation and payment history of individuals who seek credit; provides personnel selection reports to industrial, commercial, financial, and insurance companies about education, job history, employment experience, character, and skills of applicants for employment; furnishes life insurance companies with information relevant to determinations of the desirability of applicants as risks for life and health insurance and for assistance in settling claims; and provides fire and casualty insurance companies with information on applicants for insurance and reports on the property insured. Respondent also supplies information to aid in marketing decisions. (ID f. 2, 3; CX 117C.)[2] In 1970, insurance reporting accounted for most of respondent's business volume. (CX 167 C, H.) [3]

Respondent owns all of the stock of eight subsidiary companies. Its subsidiary, The Credit Bureau, Inc. of Georgia ("CBI"), provides credit reports on consumers, personnel reports and collection services and credit card promotions for credit grantors in the United States. Its credit grantor customers are mostly department stores, retailers, banks and credit card companies. (I.D. f. 7, 16.) At the end of 1959, CBI owned 22 credit bureaus. Ninety-four acquisitions were made from 1960 through January 1971 by which time CBI owned 115

[1] Complaint counsel have not appealed from the ALJ's determinations concerning product and geographic submarkets outside of the San Francisco Bay area.

[2] The following abbrevations will be used in this opinion:

I.D. f.	– Initial decision finding no.
I.D. p.	– Initial decision page no.
Tr.	– Transcript page no.
CX	– Complaint counsel's exhibit no.
RX	– Respondent's exhibit no.
RAB	– Respondent's appeal brief.
CAB	– Complaint counsel's appeal brief.
R. Ans.	– Respondent's answering brief.
C. Ans.	– Complaint counsel's answering brief.
RRB	– Respondent's reply brief.
CRB	– Complaint counsel's reply brief.
RPF	– Respondent's proposed finding no.
CPF	– Complaint counsel's proposed finding no.

credit bureaus in the United States and five bureaus in Canada. CBI's credit bureau offices are located primarily in the southeastern United States, the New York-New Jersey metropolitan area, the Washington, D.C. area, the San Francisco Bay area and the Pacific Northwest. (I.D. f. 17, 18.) CBI's revenues from credit reporting services, excluding dues and promotions, amounted to $8,429,000 in 1969. (I.D. f. 20.)

Retailers Commercial Agency, Inc., acquired by respondent in 1934, produces credit reports, primarily "character credit reports." These are frequently compiled through investigations conducted by Retailers' employees and include special-purpose mortgage reports, that is, reports on individuals applying for mortgage loans from banks or other lending institutions, and personnel reports. Retailers is regarded as an operating unit of respondent. (I.D. f. 21–26.)[3]

Equifax, through its own offices, referred to in the initial decision as Retail Credit Company offices, has provided information to insurance companies for use in determining insurability and ratings or classifications for life, health, property, marine, and automobile insurance purposes. Written reports are prepared on the basis of investigations conducted by field representatives. These offices also provide a variety of credit information services, including mortgage reports and reports to businesses on prospective employees. (I.D. f. 9, 12, 13.)

Equifax has described itself (and its subsidiaries) as one of the leading businesses in the United States engaged in providing information for use in underwriting insurance, investigation and adjustment of insurance claims, granting of credit, and selection of personnel. (CX 117C.) Its total revenue in 1971 was $190 million. (I.D. f. 5.) [4]

II. The Acquisitions

Respondent, in 1968, agreed to loan CB West Coast $3,500,000, which was secured by the pledge of all CB West Coast stock. As further consideration for the loan, respondent received an option to acquire the stock of CB West Coast in exchange for 100,000 shares of Equifax common stock. In 1969, additional loans of $375,000 and $500,000 were made to CB West Coast. Respondent, on January 2, 1970, acquired CB West Coast's stock from its sole shareholder in return for its own stock valued at $3.7 million. (I.D. f. 62–67.) At the

[3] As of December 31, 1973, respondent's other subsidiaries were Retail Credit Company of Canada Ltd., Atwell, Vogel & Sterling, Inc., the Credit Bureau of Montreal, Ltd., Physical Measurements, Inc., Gay & Taylor, Inc., and Hunnicut & Associates, Inc. (I.D. f. 7; CX 579.)

time of the acquisition, CB West Coast owned and operated 43 credit bureaus in the states of California, Idaho, Oregon, and Washington.

In October, 1970, respondent purchased the Credit Bureau Inc., of Washington, D.C. for $3 million. The bureau had been owned by approximately 25 shareholders, the four largest of which were department stores in the Washington, D.C. area. (I.D. f. 68, 77.) Finally, in January 1971, Equifax acquired the credit reporting assets, including credit files, equipment and fixtures, of the Retail Credit Association of Portland, for a total purchase price of $325,000. The association continued operations as a merchants' trade association. (I.D. f. 83.)

III. The Credit Reporting Industry

The expansion of the credit reporting industry in recent decades has accompanied the explosive growth in the use of credit to finance consumer purchases. Merchants and others in the business of extending credit ("credit grantors") depend on reliable information to avoid extending credit to customers unlikely to pay their bills.

Retail merchants typically rely on information concerning the customer's experience in paying his bills (sometimes referred to as "trade data"). The credit report is usually prepared by a credit bureau, which collects and stores information on the history of credit repayment by individuals who reside in the bureau's service area. The reports generally include identification of the subject (name, address, and marital status), employment history, public record information (for example, judgments and bankruptcies), as well as trade data. (I.D. f. 88.) Most credit bureaus sell "in-file" reports, based primarily [5] on information already in their files. Most bureaus will also attempt to develop credit information on a local credit applicant who is not already the subject of a file. (I.D. f. 89–91.)

Unlike most suppliers of goods and services, credit bureaus obtain from their customers and then compile much of the credit information contained in the reports they sell. A credit bureau must have a data base containing information on individuals who reside in the area it is attempting to serve. Apart from the public record information, such as court records, its information is generally supplied by credit grantors who must be induced to provide it voluntarily and on a regular basis so that the bureau can keep its files current. In short, credit grantors are both suppliers of, and customers for, the information maintained by credit bureaus. (I.D. f. 100.)

There have been a number of significant changes in this industry in recent years. The ALJ found that

[t]he credit reporting industry has been historically an atomistic one at the national level, credit bureaus in each trade area serving local credit grantors. . . At the local level, however, the credit reporting business has been highly concentrated in the hands of a few. This appears to have been the case especially in those areas where the credit granting merchants and financial institutions had formed their own credit bureaus on [a] non-profit basis. (I.D. p. 120.)

Since 1965, however, there has been a wave of acquisitions of local credit bureaus, primarily by a few large firms, including respondent. (I.D. f. 109; p. 3 *supra.*) As a result, several regional credit bureau chains emerged in the late 1960's and early 1970's. This was in part a product of the population movement from downtown areas into suburban areas after World War II. The major retail stores followed this movement by opening branch stores in suburban locations. In turn, new credit bureaus set up operations in these areas to service the retailers. As a result, trade information files among various credit bureaus were fragmented and a retailer might be required to contact several bureaus to obtain credit information on its regular customers.[4] [6]

A second significant change, related to the first, has been the development of computerized credit reporting services, beginning in the middle 1960's. As respondent argues, computerization has resulted in important changes in virtually every aspect of the credit reporting business. This should not be surprising; computers perform operations involving the processing of information and credit bureaus and other credit reporting firms are in the business of obtaining, storing, and selling information. Automation of credit reporting has accompanied the automation of accounts receivable files by large credit grantors. As the ALJ found, sales of credit reports produced from automated files have increased dramatically since 1970. (I.D. f. 122.)

Depending on the characteristics of the particular system, a substantial volume of reports is required to support a computerized operation. However, since 1970, companies with operational automated credit reporting systems have undertaken to automate independent credit bureaus through use of the computerized firms' software and hardware systems. (*E.g.,* RX 282.) This permits the independent credit bureau to provide computerized credit reporting services to its customers without the necessity of developing its own system. (I.D. f. 131.) A credit bureau may, therefore, provide automated services even though its volume would be insufficient to support an independent automated system.

[4] The record does not indicate that this was the primary cause of the wave of acquisitions or of the acquisitions challenged in this proceeding.

Another significant development has been the use by some credit grantors of new methods for determining eligibility for credit. Primary among these is "point scoring." Credit grantors using a point scoring system can make credit decisions based upon scores derived from numerical values assigned to information presented upon the credit application. Typically, applicants who score above a certain point total are automatically granted credit; those who score below a certain point total are automatically denied credit. Credit reports are ordered only on those who fall within the middle range. For credit grantors who use point scoring in this way, the system reduces but does not eliminate the need for credit reports. (I.D. f. 108.)

IV. Line of Commerce

The complaint alleged that the relevant service market for assessing the effects of the acquisition is "the gathering and reporting of information on individuals to businesses for insurance, claim, credit, employment and marketing purposes."[5] The complaint further asserted, and the ALJ found, that local [7] credit reporting[6] is a relevant service submarket. We do not understand respondent to challenge the validity of this submarket. Respondent does, however, object to the ALJ's inclusion of mortgage reports within the submarket.

We have only a few observations to add to the law judge's treatment of this issue, (I.D. pp. 105–08).[7] Most striking to us is the similarity of much of the information included in mortgage and other credit reports (I.D. f. 94; CX 30, pp. 9, 21), the similar methods used to prepare them (I.D. f. 89, 95), and the fact that credit bureaus typically produce both kinds of reports (I.D. p. 106; Tr. 9277). Thus, while price differentials and the fairly distinct classes of customers for mortgage and other consumer credit reports suggest that there is little head-to-head competition between them, we believe the commonality of production techniques would itself justify including mortgage reports within this submarket. As we stated in *Warner-Lambert Co.*, "A firm may be limited in its power over price by the

[5] The validity of this market is not an issue on these appeals.

[6] The complaint defines "local credit reporting" as "the furnishing of credit information on local residents by consumer credit reporting agencies to local credit grantors for use in determining whether to extend credit to consumer applicants." (¶18(a).)

[7] The factors to be considered in defining product sub-markets are set forth in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

existence of firms which can readily switch production from non-substitutes[8] to substitute products. Such firms may be regarded as part of the market as they have sufficient resource flexibility to compete if profit opportunities beckon. Such a market may or may not be co-extensive with common definitions of an industry." 87 F.T.C. 812, 866 n. 9 (1976); *see also Brown Shoe, supra,* 370 U.S. at 325 n. 42; *Sterling Drug, Inc.,* 80 F.T.C. 477, 583–95 (1972). A firm that specialized in mortgage reports would be positioned to expand into the production and marketing of non-mortgage credit reports and vice versa.[9] [8]

V. Geographic Markets

The ALJ concluded that, with respect to the local credit reporting product submarket, the relevant geographic markets are: 1) the San Francisco Bay area; 2) the Washington, D.C. market; 3) the Portland, Oregon market; and 4) the Tacoma, Washington market. Respondent challenges the judge's delineations of the San Francisco Bay area and Tacoma, Washington markets. These issues are treated *infra.*

VI. San Francisco Bay Area

A. *Geographic Market*

Respondent argues that the ALJ erred in finding that the relevant geographic market in the San Francisco Bay area consists of San Francisco, San Mateo, Santa Clara, Alameda, Marin, Solano, Napa, Sonoma, and Contra Costa counties, all bordering on the San Francisco Bay. (I.D. p. 115.)

The Supreme Court has recognized that Section 7 does not require delineation of the sections of the country in which a merger may

[8] We do not find that mortgage reports and other consumer credit reports are non-substitutes. In view of the overlap in the information they contain (I.D. f. 94), they can be substituted for each other although for many customers one or the other kind of report would be less than completely satisfactory, either because it contained too much information (and was, therefore, excessively expensive) or because it contained too little information.

[9] Respondent asserts that point scoring and other techniques for making credit determinations in lieu of purchasing credit reports have substantially affected competition in the "credit bureau industry." Respondent suggests that the judge should have made a determination as to the effect of point scoring on industry structure. (RAB 4).

We do not understand respondent to argue on this appeal that market shares and concentration data must be adjusted to take account of point scoring. We agree that point scoring has had some effect on demand for consumer credit reports. However, its effect is not different in kind from that resulting from the ability of credit grantors to make judgments on some applications based on their assessment of the applicant himself. The record does not indicate what proportion of credit grantors in the relevant markets use point scoring, but it is clear that, for most of those who use it, point scoring cannot supply a significant portion of their requirements for credit information. *See Avnet, Inc.,* 82 F.T.C. 391, 452 (1973), *aff'd,* 511 F.2d 70 (7th Cir.), *cert. denied,* 423 U.S. 833 (1975). While the availability of point scoring may impose some constraints on the prices that may be charged for credit reports, so, too, do the options of making at least some credit determinations on the basis of information on the application itself, without the benefit of point scoring. Indeed, if the price becomes high enough, it may become economical for some consumers to perform almost any service in-house.

affect competition "by metes and bounds as a surveyor would lay off a plot of ground." *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). It is complaint counsel's burden to come forward with evidence delineating the rough approximation of the geographic market. *United States* v. *Connecticut National Bank*, 418 U.S. 656, 669 (1974). The relevant market, however, must "correspond to the commercial realities . . . of the industry and be economically significant." *Brown Shoe, supra*, 370 U.S. at 336–37 (footnote omitted). It is the area where "the effect of [9] the merger on competition will be direct and immediate," *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963), and the "market area in which the seller operates and to which the purchaser can practically turn for supplies." *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

Respondent argues that the nine-county market is inappropriate because the acquired company, Credit Bureau Metro ("CB Metro"), owned by CB West Coast, was operating in a broader area at the time of the acquisition. Respondent also challenges the ALJ's finding that "the record indicates a substantial agreement among credit grantors and credit reporting firms that the nine-county-area. . .is an area of effective competition which corresponds to the commercial realities of these industries." (I.D. pp. 115–16).

However, even assuming that the area in which the acquired firm was a significant competitive factor might, under some circumstances, mark the outer boundaries of the relevant geographic market, a merger is proscribed if its effect may be substantially to lessen competition "in *any* section of the country," Clayton Act, Section 7, including sub-markets of the larger market in which the acquired firm competed.[10] At any rate, the law judge correctly found that, although Credit Bureau Metro's data base included additional counties, the bulk of its business is generated in three counties (within the nine-county area) where the three largest cities are located.[11] (I.D. f. 51; [10] I.D. p. 116; Tr. 264.) There is no evidence of

[10] We disagree with respondent that *United States* v. *Marine Bancorporation*, 418 U.S. 602, 620–22 (1974), holds that in a potential competition case the relevant geographic market must be "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm. . . ." We have rejected similar arguments in *Jim Walter Corp.*, F.T.C. Dkt. 8986 (Dec. 20, 1977) [90 F.T.C. 671], and *RSR Corp.*, 88 F.T.C. 800, 886 n. 16 (1976), noting the Court's recognition of the unique nature of banking services which effectively seals off local markets from outside competitive factors.

[11] *See also* CX 582 and 585, which appear to tie Credit Bureau Metro's principal trade area to the telephone toll free service area surrounding the San Francisco Bay, that is, the nine counties which the ALJ included in the geographic market. (I.D. p. 116).

Complaint counsel assert that Associated Credit Bureaus, Inc., the industry trade association, recognized Credit Bureau Metro's trade area as covering four of the counties included within the geographic market defined by the ALJ. (CPF 202; CX 623A–H). However, member bureaus frequently operate in areas other than those listed in the roster. (Tr. 883). The association's listings cannot support a finding that Credit Bureau Metro did not actively compete in other areas.

(Continued)

the extent to which CB Metro marketed services outside of the nine-county area.[12]

We disagree with respondent's claim that the ALJ erred in finding that the nine-county marketing area was recognized by the industry as a geographic submarket.[13] A market executive of a major competitor testified that its San Francisco marketing area "was defined by what we know as our toll-free service area. . . I think there were a total of approximately nine counties. . . ." (Tr. 582–83.)[14] An officer of the Associated Credit Bureaus, Inc., likewise included these nine counties in the Bay area credit reporting market. (Tr. 489).

Therefore, we adopt the ALJ's finding as to the relevant geographic market in the San Francisco Bay area. [11]

B. *Market Data*

The ALJ found that respondent's acquisition of CB Metro, CB West Coast's bureau in the San Francisco Bay area, did not eliminate substantial actual competition between respondent and the acquired firm and did not eliminate respondent as a perceived or likely potential entrant into the Bay area submarket. Complaint counsel appeal from each of these determinations.

The judge dismissed complaint counsel's claim that, at the time of the acquisition, respondent, through the operations of its subsidiary, Retailers, Commercial Agency, was a substantial competitor in the Bay area market. Although he found that the market was highly concentrated (I.D. f. 145), he rejected complaint counsel's proposed findings as to precise market shares of competitors in the Bay area in 1969 and concluded that Retailers made relatively insubstantial sales in the market.

The market shares complaint counsel have compiled are based upon data derived from reports submitted by respondent and local credit bureaus during the Commission staff's precomplaint investigation. In view of the fact that Retailers represented that revenue

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The same finding and evidence which support the judge's conclusion that Credit Bureau Metro did not market its products to a significant degree outside of the nine-county area also indicate that the acquired firm did not market its products to a significant degree within several of the counties included in the ALJ's relevant market. However, including these counties within the market could not prejudice respondent since the effect is to lower its market share.

[12] Of course, we do not mean to suggest that the relevant geographic market would necessarily be confined to the area where the acquired firm actively competed. See p. 9 *supra*.

[13] As to the relevancy of this factor, *see Brown Shoe, supra*.

[14] While the witness did not name the counties, they appear to be the same counties the ALJ included in the San Francisco Bay area market since the witness seemed to refer to the counties surrounding the Bay. Although the ALJ found that TRW's primary service area included one county beyond the nine-county area, (I.D. f. 139), this is not inconsistent with his conclusion that the nine-county area, or an area roughly approximating it, had industry recognition as a marketing area.

totals for local offices could not be broken down by service (CX 89B), complaint counsel formulated an alternative method of determining market share based on the assumption that local credit reporting bore the same relation to Retailers' local revenues as it did to Retailers' national operations. Based on this method, complaint counsel urged the law judge to find that local consumer credit reporting accounted for 49.2 percent of Retailers' total sales in the Bay area.[15] Complaint counsel likewise developed local credit reporting estimates for the smaller bureaus which were unable to estimate their local reporting sales (I.D. f. 145) by assuming that their local credit reports constituted the same percentage (90 percent) of their total sales as was the case for Credit Bureau Metro. Based on these assumptions, complaint counsel asserted that Retailers accounted for at least 2.8 percent and the acquired firm for 51 percent of total local consumer credit reporting sales in the market in 1969. The ALJ concluded that there was no record support for either of these critical underlying assumptions.

The estimate of the local consumer credit reporting sales of the smaller bureaus should have been accepted because, even under far more conservative assumptions about the portion of [12] these bureaus' sales in the relevant service market, market share and concentration data would not be significantly affected.[16] We also believe that considering all the circumstances, complaint counsel's estimate of Retailers' local consumer credit sales should have been adopted. As we have noted, respondent represented that revenues of local offices could not be broken down by service. *See Luria Bros. and Co., Inc.* v. *FTC*, 389 F.2d 847, 858 (3d Cir.), *cert. denied*, 393 U.S. 823 (1968). We find that Retailers' precise local reporting sales are unnecessary for purposes of the market tabulation here. *See Brown Shoe, supra*, 370 U.S. at 340, where the Court upheld findings as to the effect of a merger in more than 100 cities in which the firms competed and in the nation as a whole based in part on detailed evidence of the structure of competition in one city and testimony about the state of competition in a "fair sampling" of other cities; *see also Procter & Gamble Co.*, 63 F.T.C. 1465, 1561 (1963), *rev'd*, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568 (1967).[17] Even if Retailers' [13]

[15] Retailers' credit reporting revenues on a nationwide basis accounted for 82 percent of its total revenues in 1969 (CX 40A) and sales to local credit grantors accounted for 60 percent of credit reporting revenues. (CX 40B.) Local credit reporting revenues, therefore, accounted for 49.2 percent of total revenues.

[16] In their appeal brief, complaint counsel calculated CB Metro's market share as 49.3 percent and Retailers as 2.8 percent based on the more cautious assumption that local credit reporting sales accounted for 98 percent of the credit reporting sales of the smaller bureaus. Under the most cautious of all possible assumptions, that local credit reporting sales accounted for 100 percent of the total credit reporting revenues of the smaller bureaus, CB Metro's 1969 market share would still be 49 percent and Retailers' 2.8 percent.

[17] The instant case is distinguishable from *ITT Continental Baking Co.*, 84 F.T.C. 1349 (1974). There, the ALJ found that there was no national market in the sale of bread but assumed that nationwide sales figures could be

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credit sales ratios vary from one area to the next, the record does not indicate that the mix of business done by Retailers' Bay area offices was significantly different from [14] that of its national operation.

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used to ascertain the state of competition in the local markets. The Commission reversed on the ground that "[t]he critical issue of competitive injury must be resolved on the basis of changes in the structure of actual rather than hypothetical markets." *Id.* at 1399. An assumption that a firm's sales nationwide are typical of that firm's sales in a local market is far less speculative than an hypothesis than the over-all state of competition is the same in a local market as it is nationally; the latter hypothesis turns on assumptions about the amount of sales registered by all other firms in the local market as well as the local sales of the respondent firm.

We note that even assuming local credit reporting accounted for only one-half as large a share of the San Francisco office's revenues as it did of Retailers' nationwide revenues, 24.6 percent as opposed to 49.2 percent, (See p. 11 *supra*), Retailers' share of the market would be reduced to a still significant 1.4 percent and the share of CB Metro, the acquired firm, would remain at approximately 50 percent. Respondent, however, has given us no reason to suppose that the San Francisco office's revenues from local credit reporting were overstated by this much.

Respondent has raised several additional objections to complaint counsel's market data. It contends that their tabulations violate the terms of a prehearing order governing the presentation of statistical data. Prehearing Order, February 22, 1974, ¶5. We see nothing in the order, however, that prohibits the making of simple market share calculations from the statistical tables which are already in the record. Nor do we regard complaint counsel's calculations to be inconsistent with the ALJ's admonition to complaint counsel that "any tabulation based on underlying data not in evidence has to be presented in tabular form. . . [and] *underlying* data has to be made available to counsel in advance. . . ." (Tr. 4739) (emphasis added). Complaint counsel made similar market share calculations in their proposed findings of fact. While the ALJ rejected these calculations, he did not do so on the basis that they violated his prehearing order.

Equifax also asserts that CX 324 A–B, a chart purporting to show the consumer credit reporting sales of bureaus in the Bay area, is unreliable. (R. Ans. 22). We assume that respon-ent does not object to the manner in which the chart has been assembled but rather to the accuracy of the underlying data. These arguments are addressed below.

Equifax argues that many of the credit bureau responses, upon which the market data estimates were based, are "incomplete, contain irrelevant or estimated data or no data at all, were changed by [Commission staff] based on unverified telephone conversations, or were improperly and irregularly notarized." (R. Ans. 24). We again note that absolute precision is not required in computing market data. *Brown Shoe, supra*, 370 U.S. at 341–42 n. 69. As for its claim that the data submitted were unreliable, respondent's record citations show no more than that estimates were used by some of the local bureaus. No showing has been made that the estimates were so unreliable that they resulted in an inflation of the market shares of the principal firms. Indeed, respondent has cited testimony of a Commission staff economist that "[i]f I errored [sic], I wanted to error [sic] on the conservative side. . . [to] make these smaller firms look larger which would make the market larger which would make the share of the major concerns smaller." (Tr. 4565.)

We agree with respondent that some of the notarizations on the special reports were irregular. However, we are not aware of any requirement that survey data must be based on sworn reports. So far as their admissibility is concerned, the question is whether "the method employed [is] one that is reasonably calculated to arrive at the truth." *United States* v. *National Homes Corp.*, 196 F. Supp. 370, 372 (N.D. Ind. 1961). We are satisfied that, despite the technical defects in the notarizations, the returns were sufficiently trustworthy to be considered and we cannot find that the ALJ abused his discretion in admitting them. For the same reasons, we uphold the ALJ's decision not to reject the data because some of the statistics were modified by Commission staff on the basis of telephone conversations with survey respondents.

Respondent next objects to the averaging method used to estimate the total dollar volume of credit reporting revenues of some of the smaller credit bureaus. However, since respondent's weighted average method would have resulted in a lower average price per report ($1.83) than complaint counsel's ($2.04), complaint counsel's method produced a higher total for the smaller bureaus, a larger universe and a smaller market share for CB Metro. Therefore, the use of a simple averaging method can hardly have prejudiced respondent.

Equifax likewise argues that incorrect assumptions underlay the estimate by complaint counsel's expert of the sales of TRW Credit Data, a major firm in the market. According to respondent, the expert should have based his estimate on the $1.00 price charged by TRW in California in 1969–1970, instead of the 95.4¢ price, which was the average price of all TRW consumer credit reports in the United States. Complaint counsel do not attempt to justify the use of the 95.4¢ price. However, we cannot conclude that the charge adopted by complaint counsel's expert was erroneous or that its use significantly affected the market data relevant to an assessment of the acquisition. Had respondent's $1.00 charge been used, total local sales would have only been increased by about $38,000. (*See* CX 324.) CB Metro's market share would only be reduced to 48.9 percent and Retailers' share would remain at 2.8 percent.

We are satisfied that TRW Credit Data's estimate of its volume of consumer credit reports in the Bay area was sufficiently reliable to warrant its use in complaint counsel's market tabulation. Again, unless any error in the estimate was greater than respondent has given us reason to suppose, the relevant market data would not be

(Continued)

To the contrary, the executive [15] vice-president of Credit Bureau, Inc. of Georgia testified that while there were disparities in the mixes of business done by various offices, they were not wide. (Tr. 10892, compare I.D. p. 124.)[18] [16]

In view of the judge's uncontroverted finding that the bureaus surveyed were unable to provide estimates of their local sales, some fuzziness in the market share calculations seems inevitable. More important in these circumstances is the soundness of the assumptions upon which the share estimates are based, and we find ample support for them. The language of the Supreme Court in *Brown Shoe* is appropriate: ". . . [A]lthough [respondent] may point to technical flaws in the compilation of these statistics. . .in cases of this type precision in detail is less important than the accuracy of the broad picture presented." *Brown Shoe, supra,* 370 U.S. at 341–42 n. 69. As we said in *Avnet, supra,* 82 F.T.C. at 465–66, the question is whether the "fringe firms' aggregate market share is not so substantial as to cast doubt on what would otherwise be an illegal merger under any interpretation of Section 7. . . Thus, it is not necessary in all merger cases for complaint counsel to establish the overall size of the market as long as probative evidence exists from which the outer dimensions of that market can be determined." *See also British Oxygen, supra,* 86 F.T.C. at 1370–71. We conclude that complaint counsel's estimate of the local credit reporting sales of the smaller bureaus should have been accepted.

C. *Probable Effects*

Our analysis of whether the probable effect of the acquisition

significantly affected.

Finally, respondent asserts that the 1969 position of Credit Bureau Metro in the Bay area has been overstated because complaint counsel's expert excluded data for several credit bureaus operating within the respondent's proposed 12-county geographic area but included data for Credit Bureau Metro covering the entire 12-county area. In addition, according to respondent, complaint counsel excluded credit bureaus operating within the nine counties which the ALJ found to be the relevant geographic market.

As we have already indicated, there is no evidence that Credit Bureau Metro marketed its services to a significant degree outside of the nine-county area. Therefore, we cannot find that respondent was prejudiced by the inclusion of data for Credit Bureau Metro covering the entire 12-county area. Credit Bureau Metro's market share, including data from the twelve counties, is approximately 50 percent. Our assessment of the importance of Credit Bureau Metro's significance in the relevant market would not be materially altered if its market share was slightly smaller. Complaint counsel's expert testified that he excluded data from several bureaus operating in outlying portions of the nine counties because of his belief, based on discussions with credit bureau employees, that the bureaus were not affected by competition from Credit Bureau Metro. (Tr. 4664). This is a reasonable basis for excluding data from these bureaus and it is not inconsistent with a determination that the nine counties are the relevant geographic market; a geographic market need not be defined by "metes and bounds." *Pabst Brewing, supra,* 384 U.S. at 549. Nor is it necessary that data be included from each and every firm in the market so long as the tabulations reflect the "approximate size" of the relevant markets. *See, e.g., British Oxygen, Co.,* 86 F.T.C. 1241, 1371 (1975), *rev'd in part on other grounds sub nom., BOC International Ltd.* v. *FTC,* 557 F.2d 24 (2d Cir. 1977).

[18] Respondent, in its discussion of the extent of competition between Retailers and Credit Bureau Metro in the Bay area, asserts that Retailers' "*primary* business is the production and sale of mortgage reports." (Emphasis added) (R. Ans. 18.)

"may be substantially to lessen competition" in consumer credit reporting in the Bay area must begin with an assessment of concentration in the industry and the market shares possessed by the leading firms and parties to the acquisition. Concentration ratios and market share data may alone suffice to establish illegality absent convincing proof to the contrary. Therefore, a merger is presumptively unlawful if it "produces a firm controlling an undue share of the relevant market, and results in a significant increase in concentration . . . ." *Philadelphia Nat'l Bank, supra,* 374 U.S. at 363. The Court went on to note that: "Where concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Id.* at 365 n. 42. Consequently, horizontal mergers which either contribute to a trend toward concentration or increase, even slightly, already high levels of concentration, are particularly suspect. As this Commission stated in *Golden Grain Macaroni Co.*, "generally a dominant firm's acquisition of a competitor with even a relatively small share of the market may substantially lessen competition if the market is highly concentrated. . . ." 78 F.T.C. 63, 175 (1971), *aff'd,* 472 F.2d 882 (9th Cir. 1972), *cert. denied,* 412 U.S. 918 (1973). Conversely, the acquisition of a dominant firm by a smaller competitor may also substantially lessen competition if the market [17] is highly concentrated. *See Stanley Works* v. *FTC,* 496 F.2d 498, 508 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973) (acquisition by firm with 1 percent share of firm with 22 percent share of concentrated market).

Central to the underlying philosophy of Section 7 is the principle that "competition will be most vital when there are many sellers, none of which has any significant market share." *United States* v. *Aluminium Co. of America,* 377 U.S. 271, 280 (1964). The greater the concentration in the market "the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors." *Id.*

The judge correctly found that in 1969, the Bay area market was highly concentrated. (I.D. f. 145). In that year the top two firms had a market share of approximately 68 percent. According to complaint counsel's calculations,[19] which we find were substantially correct, the acquiring firm had approximately 2.8 percent and the acquired firm 49.3 percent of the local market. This is, therefore, clearly a

[19] These calculations are based on the assumption that the local credit reporting revenues of the smaller bureaus which could not disaggregate their sales data accounted for 98 percent of their total revenues. *See* note 16 *supra.*

case in which the acquisition increased concentration in an industry in which concentration was already great.[20] The increase in concentration was all the more significant in view of the undisputed fact that barriers to new entry in this industry are high. *See RSR Corp., supra*, 88 F.T.C. at 889.

Respondent argues, however, that because Retailers' offices are engaged primarily in producing "investigative" reports for mortgage loan and personnel purposes, and Credit Bureau Metro specializes in the selling of consumer pay habit information, the two firms were not in substantial competition. We have addressed this argument in our discussion of the relevant product market in this case. *See* p. 7 *supra*.

We would add that "it is not necessary to prove that parties to a horizontal merger sell identical services on identical terms to identical customers." *American General Insurance Co.*, 89 F.T.C. 557, 630 (1977). It bears repeating that "[w]here concentration is already great, *the importance of preventing even slight increases* in concentration and so [18] preserving the possibility of eventual deconcentration is correspondingly great." *Continental Can, supra*, 378 U.S. at 461–62. (Emphasis added). We have already found that, while there is little head-to-head competition between mortgage and other consumer credit reports, a firm that specialized in mortgage reports would be positioned to expand into the production and marketing of other types of consumer credit reports.

It should also be noted that Retailers' San Francisco office had 400,000 files and advertised that it had "thorough and extensive files to strengthen and fortify a high percentage of [its investigative] reports." (CX 125C.) Moreover, while the record does not indicate the volume, Retailers sold "updated" consumer credit reports and provided retail merchants with a secondary source of consumer credit information. (I.D. f. 143.) Likewise, Retailers competed with Credit Bureau Metro in the sale of mortgage reports. (I.D. f. 143; Tr. 13230–31; CX 176 K, L.) Indeed, respondent acknowledged, in a report submitted to the Commission prior to issuance of the complaint, that Retailers and Credit Bureau Metro competed in the marketing of both in-file and updated credit and mortgage reports. (CX 176 K, L.)[21] [19]

[20] Far lower concentration ratios and combined market shares have sufficed to create a presumption of illegality. *See, e.g., Pabst Brewing, supra; United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966); *Aluminum Co., supra; United States* v. *Continental Can Co.*, 378 U.S. 441 (1964).

[21] The report responses amounted to an acknowledgement that Retailers and Credit Bureau Metro were significant competitors since respondent estimated that in 1969 Credit Bureau Metro accounted for between 40 and 50 percent of the local in-file and updated credit reports and between 20 and 30 percent of mortgage report sales. Respondent estimated that Retailers accounted for at least 15 percent of in-file and updated credit report and mortgage report sales. This information was furnished by the manager of the operating division of respondent's

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We cannot conclude from this record whether, but for the acquisition, Retailers would likely have expanded into a major credit bureau. However, there can be no question that the local Retailers operation, by virtue of its affiliation with respondent, one of the nation's leading credit reporting firms, possessed an unusual competitive potential which was not fully reflected in its market share.[22]

Finally, Equifax points to the ALJ's conclusion that "there is some evidence that respondent's substitution for the financially ailing CB West Coast may be producing substantial benefits to the credit granting customers in the northern California area in improved service and expanded data base." (I.D., p. 147.) However, as suggested by the tentative nature of this statement, the record does not demonstrate that the acquisition has benefited consumers, much less that the benefits outweigh the loss of competition. Moreover, as the Supreme Court has observed, "a merger the effect of which may be substantially to lessen competition is not saved because, on some ultimate reckoning of social or economic debits, it may be deemed beneficial. . . . [Congress]. . . proscribed anticompetitive mergers, the benign and the malignant alike. . . ." *Philadelphia Nat'l Bank, supra,* 374 U.S. at 371.

VII. TACOMA, WASHINGTON

A. *Geographic Market*

Respondent appeals from the ALJ's conclusion that the relevant geographic market for measuring the effects of the acquisition of CB West Coast in the Tacoma, Washington area is limited to Pierce county, Washington. It asserts that the marketing area of the Tacoma Credit Bureau ("CB Tacoma")[23] in 1968–1969 consisted of the four counties of Pierce, Kitsap, Snohomish, and King, which includes the city of Seattle.[24] Respondent relies chiefly on a 1968

subsidiary, CBI. (CX 457.)

This sort of admission is, of course, not conclusive. While a firm may be expected to know the identity of its significant competitors, it will not necessarily know its own market *share* (as opposed to sales volume) or the market shares of its competitors. Still, we are not persuaded by respondent's attempt to explain away the response as merely reflecting the fact "Retailers was making some updated investigatory reports and Credit Bureau Metro was making 'some' mortgage reports." (R. Ans. 16; Tr. 13229–31.) Instead, we understand the report to signify, at least, that Retailers was offering more than nominal competition to Credit Bureau Metro in the marketing of these reports. This is supported by other record evidence discussed above. That certain witnesses from the Bay area testified that they did not regard the two firms as competitors is a fact of some significance but in view of the other evidence of competition, we cannot regard it as dispositive.

[22] The complaint alleged as a separate theory that the acquisition substantially lessened competition in the Bay area by eliminating respondent as one of a limited number of likely potential entrants. In view of our finding that the acquisition constituted an illegal horizontal merger, we need not reach this theory.

[23] Owned by CB West Coast.

[24] Indeed, complaint counsel have asserted that CB West Coast sold a "substantial" number of credit reports in Seattle. (CPF 190.)

letter by the former president of CB West Coast in response to a Justice Department inquiry which asserted that CB Tacoma served these four counties. However, neither this document nor any of respondent's record citations (RAB 59) show CB Tacoma was a [20] competitive factor outside of Pierce county or that credit grantors seeking data on residents of Pierce county could "practically turn for supplies," *Tampa Elec., supra,* 365 U.S. at 327, to bureaus based outside of the county.[25] Indeed, in a report submitted in January 1971, in response to compulsory process, CB Tacoma, by that time owned by respondent, did not list Seattle as among the communities for which files were maintained on more than 1,000 individuals. (CX 307 H.) In view of the testimony of the managing partner of the Seattle Credit Bureau that Tacoma was not "generally" regarded as part of the Seattle trading area and the fact that, as of the time of the acquisition, "it would be a very unusual situation" for the Seattle bureau to maintain files on Tacoma residents (Tr. 1088, 1090), we believe there was ample evidence that Tacoma and Seattle were distinct marketing areas. Nor has any record evidence been cited which suggests that Kitsap or Snohomish counties should have been included in the market.

B. *Probable Effects*

The ALJ found that only two firms produced and sold local credit reports in the Tacoma market in 1969 and 1970, CB Tacoma and Retailers.[26] He concluded that respondent's acquisition of CB West Coast eliminated substantial "actual" competition between Retailers and CB Tacoma in the sale of local credit reports. We agree.

The judge determined that Retailers registered at least 10 percent of sales in the market. (ID f. 210.) CB Tacoma accounted for the remainder. Respondent asserts that the two firms did not compete, that Retailers was simply a supplemental source of reports on Tacoma residents for a limited number of credit grantors and a "unique" source of information on military personnel stationed at bases in the Tacoma area.

While Retailers may have specialized in the reporting of information on military personnel, it is also apparent that it provided information on a much broader class of consumers. For example, a credit sales manager of Sears, Roebuck and Co. testified that, while he usually purchased reports from CB Tacoma, "if we noticed that

[25] Most of respondent's record citations are relevant to the plans of the Seattle Credit Bureau, which as of 1974, several years after the challenged acquisition, served only King and part of Snohomish county (Tr. 7390) but desired to serve all of Snohomish and Kitsap counties as well as Tacoma. (Tr. 7391.)

[26] Retail Credit Company also had an office in Tacoma but there is no evidence that it sold a significant number of local credit reports in this market. (I.D. f. 206.)

the customer had bought a home within the last couple of years or so, we probably would in that case buy a Retailers Commercial report feeling that it might have more recent information and be more complete." (Tr. 450–51.) Sears might [21] also order a report if it found that the report obtained from CB Tacoma was "incomplete or inconclusive, or for one reason or another we felt that we needed additional information." (Tr. 451.) The Sears witness also testified that the reports furnished by CB Tacoma and Retailers were "very similar."[27] The completeness and currency of the reports supplied by the respective firms depended on the individual report. (Tr. 454.)[28]

The best indication of the extent of competition between the two firms–and the benefits resulting from competition–was supplied by the testimony of the credit manager of Rhodes Liberty House, a full-line department store chain which had two stores in Tacoma. Rhodes had purchased reports on Tacoma area residents exclusively from CB Tacoma. However, in 1969, the credit manager became dissatisfied with CB Tacoma's service and prices and switched its business to Retailers.[29] Although the trade information supplied by Retailers was not elaborate, "there was enough to make decisions on." (Tr. 1191.)

Under these circumstances, we believe the judge correctly found that the acquisition resulted in respondent's illegally obtaining a virtual monopoly of the local consumer credit reporting market.[30] Consequently, even if Retailers sold only [22] a small number of consumer credit reports to merchants, it was an extremely important competitive factor in the market, as evidenced by the fact that it was, prior to the acquisition, the only alternative to CB Tacoma as a source of credit reports in the area.[31]

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[27] In 1969, Sears purchased approximately 10 percent of its credit reports in Tacoma from Retailers. (Tr. 457–58.)

[28] *See also* Tr. 1328.

[29] The credit manager recognized that the furnishing of in-file credit information to retail merchants was not Retailers' primary business. (Tr. 1191.) After the acquisition, Rhodes Liberty switched most of its business back to CB Tacoma. (Tr. 1192.)

[30] Respondent also argues that the acquisition of the Tacoma Credit Bureau "was a purely local acquisition, involving, at best *de minimis* competition, which does not come within the reach of Section 7." (RRB 27). It cites language in *Ekco Products Co.*, 65 F.T.C. 1163, 1210 (1964), that "Congress did not intend Section 7 to reach corporate acquisitions involving strictly local geographical areas–*e.g.* small towns." However, the Supreme Court has held that a geographic market may be as small as a single metropolitan area. *Philadelphia Nat'l Bank, supra*, 374 U.S. at 361. The Tacoma metropolitan area, whether or not it is limited to Pierce county, is not a "small town."

[31] Respondent also challenges the judge's finding that Retailers' sales accounted for at least 10 percent of local credit reporting sales in Tacoma. Retailers' office in Tacoma had total sales of $66,428 in 1969. Complaint counsel estimated that Retailers' sales of local credit reports amounted to $32,683, or 10.7 percent of sales in the Tacoma market. This estimate was based on their assumption that local credit reports bore the same relation to total sales of the Tacoma office as they did to sales of Retailers' national operation. As with his treatment of the San Francisco Bay area, the ALJ concluded that this method of computation did not provide a reliable estimate of Retailers' sales of local reports. We disagree for the reasons indicated in our discussion of the Bay area. Pp. 11–16 *supra*. Since we believe that complaint counsel's estimated 10.7 percent market share was reasonable, we need not address respondent's suggestion that the judge's inference that Retailers accounted for at least 10 percent of total

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VIII. PORTLAND, OREGON

As a result of the acquisition of CB West Coast, respondent acquired Credit Bureau Metro, Portland ("CB Metro Portland"), the local CB West Coast bureau. In January 1971, respondent also acquired the credit reporting assets of The Retail Credit Association of Portland ("CB Portland"), a credit bureau owned by credit grantors in Portland. The ALJ found that this second acquisition eliminated substantial actual competition which had existed between CB Metro Portland and CB Portland[32] in the Portland metropolitan market.[33] He rejected complaint counsel's [23] claims that the first acquisition, that of CB Metro Portland, eliminated substantial actual competition between respondent (through its local Retailers office) and the acquired bureau and that the two acquisitions eliminated respondent as a likely potential entrant into the market.[34]

The judge found that in 1969, CB Portland accounted for 71.6 percent of "identifiable" local credit reporting sales in the Portland market, CB Metro Portland accounted for the remaining 28.4 percent of sales (I.D. f. 191)[35] and that, through the second acquisition, respondent obtained a virtual monopoly position in local credit reporting. (I.D. p. 127.)

Respondent argues that the two bureaus were not substantial, actual competitors, that CB Metro's files were based primarily on residents located outside of the city limits of Portland whereas CB Portland's files were based mainly on city residents, and that credit grantors did not regard the two as alternative sources of reports. It points to the judge's finding that major credit grantors in Portland, all of whom were members of CB Portland, testified that they purchased reports on residents of the four-county area only from CB Portland and that, in their judgment, CB Metro did not compete with

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sales in the Tacoma market was baseless and inconsistent with his determination that complaint counsel's estimate was unreliable.

[32] The ALJ correctly rejected respondent's argument that the complaint did not allege that the acquisition of CB Portland eliminated substantial actual competition in the Portland market. Read together, complaint Paragraphs 10, 12 and 15 clearly challenged the horizontal effects of the acquisition.

[33] The city of Portland and Washington, Multnomah, and Clackamas counties in Oregon and Clark county in Washington. (I.D. f. 187.) Respondent has not challenged the validity of the local geographic market on this appeal.

[34] Complaint counsel have not appealed from these adverse rulings.

[35] Equifax asserts that the judge's findings regarding market share and concentration are unreliable. It notes that the findings are based on a chart (CX 332), derived from special reports submitted by CB Metro Portland and CB Portland, which complaint counsel did not cite in their proposed findings. Complaint counsel's proposed finding did indicate slightly different market shares, 71.8 percent, 27.4 percent and 0.8 percent for CB Portland, CB Metro Portland and Retailers, respectively. (CPF 229.) The differences between these figures and those used by the ALJ are insignificant. Nor are we assisted by respondent's naked claim that the ALJ relied "on an unverified estimate which substantially overstates CB Metro's sales volume [record citations omitted]." (RAB 63 n. 56.) We would add that even if this finding were in substantial error, there would be no prejudice since the market share of CB Metro is far in excess of the level necessary for it to be of competitive significance and, of course, to the extent that the market share of CB Metro was overstated, the share of CB Portland was understated.

CB Portland. After an unsuccessful attempt to acquire CB Portland, CB Metro attempted to expand its operations in the city of Portland. According to the law judge, it did not make substantial inroads into CB Portland's business because it failed to win the cooperation of Portland's major credit grantors, some of whom considered its reports to be inadequate. (I.D. f. 190.) [24]

CB Portland, the acquired firm, has, however, stated that it competed with CB Metro in the selling of credit reports during 1967 through 1969.[36] (CX 170 K–L.) While various former officers of CB Portland testified that they did not regard CB Metro as a competitor, the admission is confirmed by other record evidence. While there appears to be no dispute that CB Portland's files were based primarily on city residents and CB Metro's files were based largely on residents of the surrounding area, the ALJ correctly found that the two bureaus maintained overlapping files on some consumers. (I.D. f. 190.) Also, CB Portland indicated that its files contained information on consumers residing in certain outlying communities which CB Metro included in the listing of communities it served. (CX 170 I, CX 171 H.) Several credit grantors testified that they purchased reports from CB Portland regarding residents of areas also served by CB Metro. (Tr. 1940, 5551). More important, CB Metro had, however unsuccessfully,[37] competed [25] for CB Portland's business. "Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice." *United States* v. *El Paso National Gas Co.*, 376 U.S. 651, 661 (1964).

While we believe that CB Metro, before it was acquired by respondent, was capable of providing some measure of meaningful competition, its potential may have been limited both because many important credit grantors were members of CB Metro's competitor, CB Portland,[38] and also because of CB Metro's financial difficulties, which respondent has offered as a justification for the acquisition. Of

[36] Although CB Portland indicated that it could not estimate CB Metro's market share, the Commission's report form had asked the company to list "competitors which in your estimation accounted for fifteen (15) percent or more of the . . . markets in which you competed in 1967 and 1969." (CX 170 K.) We are willing to assume that CB Portland did not necessarily mean to acknowledge that CB Metro was a large competitor and that, in view of its representation that it was "unable to estimate" CB Metro's share of the market, it did not intend to admit that its competitor accounted for 15 percent of the market. However, we do not read the response as merely an acknowledgement by the manager of CB Portland that "there may have been some small degree of competition between the two, but that it was so insignificant that it could not be measured in percentage terms." (RRB 29).

[37] For a few months during 1968 or 1969, J. C. Penney ordered reports from both CB Metro and CB Portland, but discontinued its use of the CB Metro reports because of its belief that they were "inadequate." (Tr. 5619.) This does not demonstrate that the two bureaus did not compete, but only that one of the bureaus was, at least for the time being, a more successful competitor.

[38] We do not, however, regard successful competition with a merchant-owned bureau to be impossible, as respondent argues. The financial interest of each owner was not great. In 1969, there were 973 member-stockholders, each of whom owned an equal share in a bureau whose revenues from credit reporting were $608,000 in 1967 and $656,000 in 1969 and net profits were estimated at approximately $15,000 and $32,000 during those

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course, its financial condition improved after respondent's acquisition and CB Metro could, therefore, be expected to offer more vigorous competition.

Indeed, what we have said about the competitive potential of respondent's Retailers offices in the Bay area and Tacoma applies with greater force to CB Metro. As part of a substantial chain of credit bureaus, supported by Equifax' massive financial resources and expertise, CB Metro might have become a far more significant competitor to CB Portland than it was prior to the second acquisition. While the market shares of CB Metro and CB Portland may overstate to some extent the amount of actual competition between them they do not, on the other hand, reflect the full competitive potential of CB Metro which was lost as a result of this acquisition.

Thus, the record does not contradict the *prima facie* case established by the statistical data, and we conclude that the acquisition of CB Portland, by combining firms controlling 72 and 28 percent of the market, eliminated all existing competition. [26]

IX. WASHINGTON, D.C.

The judge found that the acquisition of CBDC violated Section 7 and Section 5 by eliminating respondent as one of the few most likely future entrants into the Washington, D.C. metropolitan area. He rejected allegations that the acquisition removed respondent as a perceived potential entrant into the market and that it eliminated substantial actual competition between respondent and CBDC.

Counsel for Equifax asserts that respondent was neither an actual nor a perceived future entrant, that the acquisition actually lowered entry barriers and that deconcentration has occurred or has been occurring since the acquisition. Complaint counsel argue that the acquisition eliminated respondent not only as a perceived potential entrant but also as a probable future entrant into the market. Complaint counsel do not appeal the ALJ's conclusion that the record fails to show that the acquisition eliminated substantial actual competition between respondent and CBDC.

We disagree, however, with this finding for much the same reasons that we have set aside the judge's finding that the acquisition of CB West Coast did not eliminate substantial actual competition in the San Francisco Bay area.[39]

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years. (I.D. f. 78, 81, CX 170G.) The credit reporting assets were sold to respondent for $325,000. It seems improbable that the fact of ownership would be a decisive factor in a creditor's consideration of a proposal made by a competing bureau.

[39] The horizontal effects of the acquisition in Washington were challenged in the complaint and litigated before the ALJ. We assume that respondent presented its best arguments to the judge why the record did not support

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A. *Market Data*

Complaint counsel asserted before the ALJ that in 1969, CBDC accounted for approximately 57 percent of local credit reporting revenue, Stone's Merchantile Agency had approximately 41 percent, Retailers had about 2 percent and the local Retail Credit Company offices had nominal sales. (CPF 373.) In that year, CBDC acquired Stone's and, as a result, according to complaint counsel's calculations, it controlled roughly 98 percent of the market. The judge rejected complaint counsel's estimate [27] of Retailers' local market share for the same reason that he rejected the estimates in other geographic areas, that it could not be assumed that Retailers' local credit reporting revenues bore the same relation to total local office sales as they did to Retailers' nationwide sales. We have already addressed this argument. *See* pp. 11–16 *supra.* In addition, according to the ALJ, "the record suggests strongly that the Washington, D.C. metropolitan area at least probably was among the low-ratio areas" that is, areas in which local credit reporting revenues were a smaller proportion of total revenues than they were nationwide. (I.D. p. 124.) The finding cited (I.D. f. 218), however, offers scant support for this proposition. One former employee of Stone's testified that Retailers sold credit reports only in conjunction with the mortgage loans made by insurance companies to whom Retailers sold insurance reports. (Tr. 2253.) However, Retailers had a substantial number of non-insurance customers to whom it apparently sold mortgage reports. (CX 340 A.) The fact that two former employees of Stone's testified that they did not consider Retailers to be in competition with Stone's (Tr. 2253, 2261) is relevant but certainly not dispositive of the issue. Nor is the fact that three credit grantor witnesses testified that they did not purchase credit reports from Retailers while one testified that he was not familiar with Retailers. (Tr. 2052–53, 2061, 8406, 9127.) This should not be surprising since there is no claim that Retailers was a major factor in the market, only that its share of the market was more than nominal. It necessarily follows from a firm's small size that many consumers in the market will not use it as a source of supply and may not even be aware of its presence in the market. However, the record indicates that a number of the

finding a violation on this theory. The parties also briefed the standards to be employed in finding a horizontal violation in connection with the appeals in the other submarkets. Moreover, with respect to the legality of the acquisition of CBDC, the parties addressed the significance of Retailers' presence in the market. While the briefing was directed to whether Retailers provided respondent with a "toehold" for future expansion, the discussion is also pertinent to whether respondent was already a significant competitor in the market. We, therefore, believe that, even without an appeal on this issue, it is appropriate for us to substitute our findings of fact and conclusions of law for those of the ALJ. *See* Rules of Practice, Section 3.54(a).

customers of Retailers and the local Retail Credit Company offices were also customers of CBDC and Stone's. (CX 340.)[40]

Nor is it dispositive, or even relevant, that the special report CBDC submitted to the Commission did not identify Retailers as a competitor in 1967 or 1969 since the report form requested a list of competitors which, in the reporting firm's estimation, accounted for 15 percent or more of the market. (CX 71.) Retailers, of course, fell far short of that level.[41] [28]

B. *Probable Effects*

In the Washington, D.C. market, the leading firm had virtually the entire market, and, as a result of the acquisition, respondent obtained a 100 percent market share.[42] And, as we said in connection with the West Coast acquisition, the local Retailers operation, by reason of its affiliation with Equifax, one of the nation's leading credit reporting firms, possessed an unusual competitive potential which was not fully reflected in its market share at the time of the acquisition.

As with the Bay area market, we find it unnecessary to reach the question whether the acquisition eliminated Equifax as a substantial potential competitor, since respondent was already a significant, actual competitor in Washington. As the only supply alternative to complete monopoly prior to the acquisition, respondent's market share understates its competitive importance in the market. Moreover, its incentives and capacity for expansion should be considered in assessing the loss of competition that resulted from the acquisition.[43] [29]

As Professors Areeda and Turner have pointed out:

> Suppose that a monopolist, who has long supplied 99 percent of his market, acquired the one firm supplying the remainder of that market. The acquisition should be prevented even if we assume that the small firm would continue to play only a very

[40] Respondent notes that the common customers listed on CX 340 represent less than five percent of the subscribers of CBDC. (RRB 15 n. 15.) However, that there was this much customer overlap is some evidence that there was more than a *de minimis* amount of competition between the two firms.

[41] CBDC did indicate, however, that there were "numerous smaller reporting agencies" present in the market. (CX 71.)

[42] While the complaint did not challenge the legality of CBDC's acquisition of Stone's, it is noteworthy that CBDC's size was itself a product of acquisition. This is, therefore, a market in which, as a result of two acquisitions, all competition was eliminated, at least as of the date of the acquisition.

[43] There is often no clear line between actual and potential competition theories. In its purest form, potential competition theory holds that an acquisition should be set aside because the acquiring firm either has had a pro-competitive effect on those already in a concentrated market or, but for the acquisition, would likely have entered the market in a manner that would contribute to competition. However, the presence of a firm that is already in the market may have the same kind of potential competitive effects as a firm outside of the market. Other, larger, firms may temper their prices to dissuade the smaller firm from expanding its presence and the smaller firm, in response to changes in the market (such as higher prices and profits) or other incentives such as its interest in expanding to take advantage of economies of scale, may in the future become a larger, pro-competitive, force in the market.

minor role. . . Notwithstanding its minor position, such a rival offers an alternative source to buyers, an additional locus of decision-making and possible innovation, an actual or possible check on the monopolist's pricing or other laxity, and a center of production or marketing experience that might come into more aggressive hands and thus facilitate a more substantial challenge to the monopolist. 3 P. Areeda & D. Turner, *Antitrust Law* 102 (1978).[44]

Although the local Retailers office had a relatively small total credit reporting volume – $95,000 – its size must be assessed in light of the fact that it is part of the nationwide Retailers chain which operates over 100 branch offices and sub-offices throughout the United States. (I.D. f. 23.) In 1969, Retailers had revenues of almost $4,319,000 and net profits after taxes of above $244,000. (CX 174C.) And, of course, Retailers is owned by Equifax, by its own admission, one of the nation's leading credit reporting businesses. (P. 3 *supra.*)

Moreover, the local Retailers office had a reasonably broadbased clientele including finance companies, mortgage loan companies, banks, and savings and loan associations. During various times from 1967 through early 1973, it had 37 customers in common with CBDC or Stone's. (CX 340 A–B.) With these fairly wide contacts in the metropolitan area,[45] records it maintains on individuals on whom it has prepared reports (Tr. 3843), and other advantages such as its knowledge of the local market, respondent would have a significant head-start over other firms if market conditions made it attractive to enter into competition or, in respondent's case, more vigorous competition, with CBDC.

Indeed, respondent has argued that " 'capability' of *de novo* entry is determined solely by the credit grantors in the subject market, not by any attempted entrant. . . [T]his capability was non-existent in credit reporting markets dominated by merchant-owned credit bureaus in 1970." (RAB 49–50.) We assume that [30] respondent's argument would also apply to the capability of a small firm already in the market obtaining a large share of a market dominated by a merchant-owned credit bureau such as CBDC. While respondent has exaggerated the difficulties of competing against merchant-owned credit bureaus,[46] we believe it is noteworthy that respondent has argued, and the record indicates, that CBDC was "irrevocably committed to selling its credit reporting operations to one of the credit bureau reporting companies that could provide computerized services. . . . Consequently, if respondent had not acquired the

[44] The fact that CBDC had only recently obtained its monopoly, or virtual monopoly, position, by virtue of its acquisition of Stone's, does not affect the analysis.

[45] Equifax' contacts with credit grantors in the metropolitan area might also provide useful leverage in the event the local Retailers chose to expand.

[46] *See* p. 32 *infra.*

Washington Credit Bureau, it would have been acquired by one of the other credit reporting companies." (RAB 52; *see also* Tr. 8396, 9146–47.) Once "a merchant-owned credit bureau, such as the Washington Credit Bureau, is acquired by a private company, entry barriers are in time diminished because the credit grantors, no longer having an economic interest in the bureau, are more willing to cooperate with an entrant by providing data and utilizing services. . . ." (RAB 53 n. 44.) Thus, according to respondent's argument, once the merchant-owned CBDC was sold either a new entrant or a small firm already in the market would be better able to provide vigorous competition. For all of these reasons, Retailers might well have become an even more significant competitor in the market had Equifax, its owner, not acquired the dominant firm.[47]

The record also indicates that respondent was capable of establishing a major credit bureau in Washington and that it had a number of incentives to do so. To be sure, respondent's management testified that Equifax would not have started a new credit bureau in Washington. (*E.g.*, Tr. 11, 629.) Moreover, at least during the period from 1968 through 1972, CBI (respondent's credit bureau chain) had not created a file which was not [31] contiguous to an area in which it possessed a data base. (Tr. 11, 622.) However, this evidence cannot be conclusive of the issue since "entry by acquisition is almost always more attractive to management than independent entry. An acquisition enables a company to quickly capture the acquired company's share of the market. Risk is minimized." *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1238 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906 (1974). As long as attractive acquisitions are available, it is not surprising that a firm will not spend its investment capital on more risky *de novo* entries.

Equifax was, and is, a leading credit bureau chain. It had the necessary financial resources. By the time of the acquisition, it had already computerized some of its offices (I.D. p. 135) and it had the technical expertise needed to run a large automated bureau. Moreover, there is some indication that respondent's management wished to "control" credit reporting in the Northeast and Southeast (I.D. p. 135 & n. 28; CX 168 A, C) and to establish itself in as many

[47] Respondent's senior vice president testified that by the early 1960's, Retailers' product "was no longer selling." (Tr. 13, 040.) While this might suggest that the prospects of Retailers' expanding, or even maintaining the scale of its presence in any local market, were dim, the witness was referring to the sale of credit reports to national and regional credit grantors. (Tr. 13, 038.) It should be noted that Retailers' growth into a major competitor in Tacoma began in 1963. (I.D. f. 208.) While Retailers' total consumer credit reporting revenues had declined during the period 1965 to 1970 (CX 40A), the decline was not dramatic. A 1970 internal marketing plan was optimistic about Retailers' prospects for expansion (CX 375 B), and a report for 1972 indicated that sales efforts would be intensified in pre-selected cities although the establishment of new "sub-offices" was doubtful. (CX 372 B–C.)

regions as possible. (I.D. f. 174, Tr. 12, 363.) While it does not necessarily follow that respondent intended to set up credit bureaus in each and every major market in the Northeast or Southeast, regardless of the barriers and the foreseeable profits that could be earned, respondent would not be able to "control" these regions unless it had a large presence in many, if not most, of the major markets. That Washington would be given serious, and, perhaps special, consideration as a candidate for major expansion if acquisition was precluded, is supported by management's view of the "strategic location of . . . [the Washington, D.C. bureau] in relation to CBI-East's present operations. . . ." (CX 81C.)[48] [32]

Finally, respondent has exaggerated the difficulties of successfully competing in a market dominated by a merchant-owned credit bureau. (RAB 50). Stone's, the credit reporting firm CBDC acquired in 1969, had thrived despite the fact that its files were more limited than those of CBDC. (I.D. f. 229.) Only four credit grantors in Washington, D.C. (each of them leading department stores) had a substantial proprietary interest in CBDC and these firms accounted for only 5 to 15 percent of the information in the bureau's files and 10 to 20 percent of its credit reporting sales. (I.D. f. 228, Tr. 8453.) A new bureau would need credit information from a substantial portion of, but not necessarily the entire, retail community. (Tr. 8402.) Therefore, while a merchant-owned bureau might have significant advantages, a challenger's prospects would be far from hopeless.[49] At any rate, the advantages of a merchant-owned bureau are largely beside the point since, as respondent has correctly argued, the merchant-owned CBDC was irrevocably committed to selling out to a credit reporting company that could provide computerized services. (P. 30 *supra.*)[50]

The more difficult questions are whether an expanded operation would likely have generated large enough profits, or would have provided respondent with sufficient advantages[51] that would contribute to the firm's over-all profits, to justify the substantial costs of

[48] *See also* CX 167 F, referring to the Washington, D.C. acquisition as adding to respondent's strength in the "Middle Atlantic area." Of course, this management statement refers to the acquisition of CBDC, and not to a *de novo* expansion. Still, the establishment of a substantial new credit bureau in Washington, assuming that it was feasible, would likewise add to respondent's strength in this area.

Also, as the ALJ found, management believed that the acquisition of the Washington, D.C. data base was necessary to bring computerization to its manual credit bureaus then operating in the northeastern section of the country. (I.D. f. 227.) The added volume enabled respondent to employ a larger computer that, in turn, supported automation of other bureaus. (Tr. 12, 486.) However, it does not necessarily follow that a presence in Washington on a much smaller scale than would result from the acquisition of CBDC would have supported computerization of the manual bureaus.

[49] Moreover, a challenger, like respondent, might have advantages of its own, such as greater access to computer technology. *See also* pp. 29, 31 *supra.*

[50] Respondent's argument that such a sale would lower entry barriers to a new firm is set forth at p. 30 *supra.*

[51] Such as those discussed at p. 31 *supra.*

expansion on a massive scale and the foregoing of other investment opportunities, such as expansion into other geographic markets. The answers to these questions would in turn depend on future market conditions and the nature of future developments in the industry that might affect the costs of a major expansion.

In sum, this acquisition violated Section 7 and Section 5 by eliminating the only remaining competition in the market – a firm that, at the time of the acquisition, was a significant competitor and which offered at least the prospect of becoming an even more significant factor in the future.[52] [33]

X. DEFENSES

A. *Failing Company*

Equifax asserts that CB West Coast faced a grave probability of business failure and that the acquisition was, therefore, [34] immunized by the failing company defense. The Supreme Court has held that the requirements of this defense are met only if 1) the resources of the acquired company are so depleted and the prospect of rehabilitation so remote that it faces the grave probability of a business failure; and 2) it is established that the acquiring company is the only available purchaser and the acquired firm could not otherwise keep the enterprise afloat, for example by reorganizing

[52] Respondent argues that the market has become substantially deconcentrated by virtue of the "competitive" entry of TRW Credit Data and the fact that "TRW Credit Data's entry is a direct acquisition of the previously merchant-owned bureau." (RRB 24.) However, the record does not permit a conclusion that the market has or is likely to become significantly deconcentrated. Respondent presented evidence that, beginning in 1974, TRW was in the process of developing a data base in the Washington, D.C. metropolitan area. (Tr. 11, 184.) However the vice president and general manager of TRW's Information Services Division, in response to respondent's direct examination, testified that TRW was soliciting customers in Maryland and, asked whether TRW had any plans for expansion, responded, "We have none. I don't know." (Tr. 6029). [We note that an internal planning document, dated January 1970, listed Washington, D.C. as a target market. (RX 13.) This obviously falls far short of proving that TRW has, in fact, become a major competitor in the market. The *in camera* testimony cited by respondent (Tr. 6626–32; 11,956) is no more conclusive.]

Of course, even if TRW's presence in Washington were to become as significant as its presence in the San Francisco Bay area, the Washington market would still be highly concentrated so that the loss of the competition provided by Retailers would be significant. Nor are we persuaded by respondent's argument that the acquisition of CBDC was procompetitive by removing the barrier to entry of a creditor-owned bureau. As we have already indicated, we believe respondent has exaggerated the difficulties of competing against a merchant-owned bureau and, in any event, the bureau would have been sold to another credit reporting firm had respondent not purchased it. *See* p. 30 *supra*.

The judge also found that substitution of respondent for the acquired credit reporting firms in the Portland, Oregon, Tacoma, Washington and Washington, D.C. markets "significantly raised barriers to entry in those markets. Respondent is a national chain possessing far greater resources than the acquired bureaus. . . . Since the acquisitions, respondent has integrated the acquired bureaus into its system of regional computerized credit reporting centers. . . . A new entrant into these areas would therefore need substantially greater resources to compete effectively than would be the case but for the acquisitions." (I.D. f. 235, citations omitted.) We are unprepared to conclude from this record that substitution of respondent for the previous owners of these bureaus has entrenched their position by substantially raising entry barriers.

under Chapter X or Chapter XI of the Bankruptcy Act. *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969).[53]

The ALJ rejected the defense. First, he found that the main reason for the firm's adverse financial condition was that it had made a major investment in a pioneering computerization program which did not produce an immediate return, and that it had incurred substantial expenditures for its acquisitions of several credit bureaus in 1967. According to the judge, these investments promised "substantial financial rewards in the near future." (I.D. p. 145; *see also* RX 2-5.) Second, he found unsupported the contention that there were no other prospective purchasers and no other firms which were interested in extending aid to CB West Coast. Third, he found that there was no credible evidence showing that the firm's reorganization prospects under Chapters X and XI of the Bankruptcy Act were "dim or nonexistent." (I.D. p. 145.)

We believe that the question whether the firm's financial condition was sufficiently adverse to meet the requirements of the first element of the defense is closer than the ALJ seemed to think. However, assuming that this element was satisfied, we agree with the judge that respondent failed to satisfy its heavy burden of proving that it was the only availble purchaser, *Golden Grain Macaroni, supra*, 472 F.2d at 887, and that the acquired firm could not otherwise maintain its operations. Before entering into the loan agreement with respondent, Mr. Francis Smith, the owner of CB West Coast, did approach a number of other firms about the possibility of their acquiring the firm or extending it credit. However, from Mr. Smith's rejection of certain acquisition proposals, the judge found that the record did not support a finding that there was no other prospective purchaser. Moreover, as the judge found, CB West Coast had no "serious discussions" with other firms about either extending loans to CB West Coast or acquiring the bureaus after the loan agreement with Equifax. (I.D. f. 368.) [35]

Respondent argues that CB West Coast's rejection of the acquisition offers is consistent with a finding that respondent was the only available purchaser. It asserts that two of the offers did not meet the firm's desperate need for cash and one did not provide cash to pay off the outstanding liability on which Mr. Smith and his wife had given their personal guaranties. We agree with respondent that a company has no obligation to sell to a prospective purchaser on unreasonable terms or conditions. *See, e.g.*, Bok, *Section 7 of the Clayton Act and*

[53] There can be circumstances where even the satisfaction of these requirements does not suffice to immunize an otherwise unlawful acquisition. *See United States Steel Corp.*, 74 F.T.C. 1270, 1289 (1968), *remanded*, 426 F.2d 592 (6th Cir. 1970).

the Merging of Law and Economics, 74 Harv. L Rev. 226, 345–46 (1960). For example, it may be reasonable to reject a purchase offer that will have the effect of reducing competition in favor of a loan which may enable the firm to maintain its independent existence. *See United States Steel, supra,* 74 F.T.C. at 1280.

We cannot, however, rely on respondent's conclusory assertion, supported by equally conclusory testimony and Initial Decision findings, that two of the offers were not accepted because they would not have satisfied CB West Coast's need for cash. (R. Ans. 50; I.D. f. 366; Tr. 300). This is insufficient to satisfy respondent's heavy burden on this issue. *Golden Grain Macaroni, supra.* Nor are we prepared to conclude that the failure of one of the offers to provide cash to pay off the outstanding liabilities on which Mr. Smith and his wife had given their personal guaranties meant that the offeror should not be treated as an available purchaser. As indicated below, there must be a showing that the acquired firm's reorganization prospects under Chapters X and XI were "dim or nonexistent." A reorganization, of course, typically results in a less than complete satisfaction of the debtor's obligations. We, therefore, cannot see how a firm may treat an offer as other than *bona fide* simply because it does not provide for satisfaction of the owner's liabilities. In short, nothing in the record suggests that an acquisition by any of the offerors would have been as anticompetitive as the loan agreement, secured as it was by an option for respondent, a competitor, to purchase the firm.

At any rate, the law judge found that after consummation of the loan agreement, CB West Coast had no further serious discussions with other companies about a loan or the possibility of acquisition. According to respondent,

> The Law Judge, in effect, found that at the time of the respondent's acquisition of CB West Coast in January, 1970 there were no other available purchasers since after consummation of the loan agreement in August 1968 CB West Coast had no further serious discussions with other companies concerning a loan or [36] the possibility of acquisition (F. 368). Assuming January, 1970 is the relevant time period for making this determination, respondent has established this aspect of the "failing company" defense. (R. Ans. 50.)

We fail to see how the ALJ's finding amounts to a determination that there were no other available purchasers at the time of the acquisition. The acquired firm was under a duty to seek out other purchasers, *Golden Grain Macaroni, supra,* and this duty was even clearer before the acquisition than it was prior to the consummation of the 1968 loan agreement.[54]

[54] This would be the case unless the loan agreement effectively precluded the borrower from seeking out a purchaser other than the lender. In exchange for the loan, respondent received a pledge of all of the common stock

(Continued)

Finally, the judge correctly found that respondent failed to show that CB West Coast's prospects of successfully reorganizing under Chapters X or XI were dim or nonexistent. Respondent argues that it was most prudent for CB West Coast to have accepted a loan from Equifax, which enabled it both to continue its operations and to develop its computerized credit reporting system. [37] Be that as it may, no showing was made[55] that reorganization would not have been feasible as of the time of the acquisition.[56]

B. *Respondent's Purpose*

Much of the record is devoted to respondent's contention that it lent funds to CB West Coast primarily to assist the firm in its development of a computerized reporting system, which respondent needed for its operations in the Southeast. According to Equifax, it subsequently acquired CB West Coast in order to ensure continued development of the computerized system and to protect its substantial investment. The ALJ, however, found that the loan transaction was "intended from its inception by both parties to culminate in an acquisition." (I.D. f. 66.) [38]

Evidence indicating the purpose of the merging parties may be an aid in predicting the probable future conduct of the parties and thus the probable effects of the acquisition. *Brown Shoe, supra,* 370 U.S. at 329 n. 48. However, we fail to see how respondent's purpose in exercising its option to purchase CB West Coast, whether it was

as security for the loan and an option to acquire the stock in exchange for shares of respondent's stock. (I.D. f. 346.) Equifax has contended that its "primary interest in CBS [CB West Coast] was to obtain an automated credit reporting system for CBI and not to acquire CBS or its market position in any area of the country. Further, it is clear that at the time of the loan agreement, respondent had no plans to exercise the option to acquire CBS. It was primarily and fundamentally interested in obtaining a viable computerized credit reporting system. . ." (RPF 56.) Assuming that CB West Coast had been able to find a differnt acquirer, we cannot conclude that respondent would have exercised its option to purchase CB West Coast's stock, at least so long as its loans and its interest in the development of the computerized system would be protected.

We do not find from the record that CB West Coast would likely have been able to find a *bona fide* purchaser at this time, only that respondent has failed to meet its heavy burden of showing that there were no available alternative purchasers.

[55] The ALJ ordered stricken testimony that West Coast would not have survived a Chapter XI proceeding. (Tr. 7907–08.) We cannot find error, much less the clear abuse of discretion that would warrant our overturning this evidentiary ruling.

[56] This case is distinguishable from *United States Steel, supra,* where the respondent presented detailed testimony that, in view of the acquired firm's lack of a potential for profit, a reorganization would not be successful. Here, the ALJ correctly found that CB West Coast's long-term prospects were favorable.

Respondent also argues that subsequent decisions by the Supreme Court and lower federal courts have limited the "dim reorganization prospect" requirement to the particular facts of *Citizen Publishing Co., supra.* However, there is no reason to believe that the Court intended to dispense with this requirement in *United States* v. *Greater Buffalo Press, Inc.,* 402 U.S. 549 (1971), where there was no need to address the question since the Court held that other elements of the defense had not been satisfied, or in *United States* v. *General Dynamics Corp.,* 415 U.S. 486 (1974), where the Court referred to the elements of the defense (without mentioning the reorganization element) but noted that the defense was inapposite to the lower court's finding of a lack of violation. Other decisions have reaffirmed the requirement, *see U.S. Steel Corp.* v. *FTC,* 426 F.2d 592 (6th Cir. 1970); *Phillips Petroleum, supra,* 367 F. Supp. at 1259, and we respectfully decline to follow the contrary holding in *United States* v. *MPM, Inc.,* 397 F. Supp. 78 (D. Colo. 1975).

intended, as respondent argues, to protect its investment in CB West Coast, or to acquire CB West Coast's market shares, would have any bearing on the probable future effects of the acquisition.

Nor are we satisfied that respondent's interest in obtaining CB West Coast's computerized system could justify this acquisition. This is merely a variation of the familiar claim that an otherwise illegal merger should be excused because it may promote efficiency. "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition." *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 580 (1967), *reversing* 358 F. 2d 74 (6th Cir. 1966), *reversing*, 63 F.T.C. 1465 (1963).

This is not to suggest that a merger which results in increased efficiencies may not in certain cases increase the vigor of competition in a relevant market. *Procter & Gamble, supra*, 63 F.T.C. at 1581. However, respondent has not shown that in any relevant market competition was increased as a result of the acquisition. Indeed, in one market, Tacoma, the acquisition of CB West Coast resulted in the elimination of virtually all competition. *See* p. 21 *supra*.

In respondent's judgment the CB West Coast system "was the best computerized credit reporting system available to CBI of Georgia at the time." (RAB 18.) However, CB West Coast was also the leading firm in at least two of the relevant markets, and the fact that it had the best computer system available does not alone legitimize its acquisition by a competitor; dominant firms often have innovative technology, know-how and other advantages not available to the competition. Nor is it clear that another available system could not have been adapted by respondent or that Equifax could not have developed its own system. [39]

XI. REMEDY

Based upon his findings and conclusions that the challenged acquisitions had substantial anticompetitive effects in three geographic markets, Tacoma, Washington, Portland, Oregon, and Washington, D.C., the judge recommended entry of an order requiring divestiture of the credit reporting business acquired as a result of the acquisitions, except for the bureau operations in and around the San Francisco Bay area, where he found that the acquisition of CB West Coast had no anticompetitive effects. He also recommended a ten year ban on respondent's entering into management contracts with any of the divested businesses, a ten year ban against acquisitions of firms engaged in the gathering and

reporting of credit information, without prior Commission approval, and an absolute ban against such acquisitions pending approval by the Commission of the required divestitures. Complaint counsel urge the Commission to require divestiture of the bureau operations acquired in the Bay area and to add several additional collateral requirements which they claim are necessary to the restoration of competition.

The purpose of relief in Section 7 cases is to undo the probable anticompetitive effects of the unlawful merger, to restore competition to the state in which it existed at the time of the merger, or to the state in which it would be existing at the time relief is ordered. *See, e.g., Fruehauf Corp.*, F.T.C. Dkt. 8972 (Feb. 22, 1978) [91 F.T.C. 132]. In order to achieve this goal, a strong presumption favors total divestiture of the unlawfully acquired entity as the surest means of achieving it. *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972); *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961); *Fruehauf supra.*

There can be no doubt about the appropriateness of the recommended divestiture of CBDC. Respondent cites management testimony that it would not re-enter the market if forced to divest. However, "[e]ven apart from the fact that such testimony is inherently self-serving, it would represent, at best, only the current views of present management. Circumstances change, as does management." *British Oxygen, supra*, 86 F.T.C. at 1359. Moreover, we have found that the acquisition eliminated significant existing competition between respondent (through its Retailers operation) and CBDC. Divestiture should at least restore this competition.

In view of our judgment that the acquisition of CB West Coast had substantial anticompetitive effects in the San Francisco Bay area, we conclude that the ALJ's proposed order should be modified to require divestiture of the business acquired in this market. As in Washington, D.C., this divestiture will likely at least restore competition eliminated as a result of the acquisition. [40]

Respondent argues that divestiture of credit reporting operations in the Bay area would require it to abandon its service contracts with other credit bureaus located in northern California and in the East "since without the San Francisco revenues the costs of providing computer service to these contract bureaus would exceed the revenues sustained from them." (R Ans. 55; *see also* RAB 71.) According to Equifax, loss of the San Francisco revenues would also significantly increase CBI of Georgia's fixed costs per dollar, reduce its profitability, and render it unable to support its present computer capability. Respondent claims that without the Bay area data base it

would be a "total financial disaster" for it to continue its expansion on the West Coast. (R. Ans. 56.)

We note, however that CB Metro's revenues from report sales in 1969 amounted to $2,483,760 (CX 324). In that year, CBI's total revenues from reporting services amounted to $8,479,000. (I.D. f. 20.) Respondent, of course, subsequently acquired CBDC which in 1969 registered revenues of $3,355,000 (including the sales of Stone's Mercantile Agency).[57] CBI has subsequently entered into a number of service and management contracts with independent bureaus and respondent's total revenues from local credit bureau operations amounted to $30,380,000 in 1973. (CX 579E.) There is simply nothing in the record to suggest that the over-all profits of either CBI or Equifax will be substantially affected by the loss of the revenues of the San Francisco bureau or, for that matter, of the entire CB West Coast chain.

Nor does the record indicate with any certainty that respondent will be forced to abandon either its current service contracts or its expansion on the West Coast, much less than this would substantially diminish competition in the markets which would be affected. At any rate, "as a general proposition, the Commission when considering the competitive consequences of divestiture will reject as irrelevant evidence relating to the effects of divestiture in markets which were not found to be relevant markets for the purpose of determining the legality of the acquisition." *Litton Industries, Inc.*, 85 F.T.C. 333, 384 (1975); *see also Philadelphia Nat'l Bank, supra*, 374 U.S. at 371. Nor is the possible effect of a divestiture upon respondent's profitability in itself a reason not to order divestiture. *United States* v. *Continental Can Co., Inc.*, 1964 Trade Cases, ¶71,264 at 80, 139 (S.D.N.Y. 1964); *RSR, supra*, 88 F.T.C. at 895.

More troublesome is respondent's claim that the divestiture of its acquisitions in Portland will substitute one monopoly for another. Complaint counsel's argument that divestiture would reestablish respondent as a toehold firm through its ownership of Retailers and Retail Credit Company offices in Portland and as a potential entrant is not helpful in view of the ALJ's correct determination that respondent was neither an actual nor a potential competitor in this market at the time it acquired CB West Coast. There is, accordingly, little basis for concluding that respondent would be left as either an actual or a potential competitor of the new monopoly that would be established as the result of the ALJ's recommended divestiture.

Complaint counsel urge that the CB Portland and CB West Coast

[57] Of course, respondent will also lose these revenues as the result of our divestiture order.

operations in Portland be sold to different firms but that if, after one year, this proves impossible, the operations be divested together and a copy of the files of the combined bureaus be made available to prospective purchasers. The record indicates, however, that the CB Portland and CB Metro Portland operations have become hopelessly commingled. (Tr. 11885–88.)[58] We can, therefore, see little point to requiring respondent to attempt to unscramble the assets. Nor do we believe it is necessary to require respondent to divest CB Portland and CB Metro Portland as a single unit. To do so would not restore competition unless the purchaser of the divested bureaus was in turn required to assist in the establishment of a second credit bureau.[59] [42]

We believe that, with respect to the Portland market, the presumption in favor of total divestiture of the unlawfully acquired entity has been overcome. While we cannot conclude that a divestiture order limited to a few markets would restore competition, see pp. 43–44 *infra*,[60] the contribution Portland would make to the package is outweighed by the greater efficiency of a remedy which permitted respondent to remain in this market. We are concerned about the workability of a remedy which would probably require postponement of efforts to establish a new bureau in Portland — necessary to the restoration of competition in that market — until after the divestiture was completed[61] and which would depend on this burden's being assumed by the new owner of the chain.

In order to restore competition to this market, we will require respondent to assist in establishing a new credit bureau by providing a suitable purchaser with copies of its most current files for a period of three years. The record indicates the sale of a copy of a bureau's credit reporting file can enable a new firm to enter a local market. (*See* Tr. 6526, CX 455.) Moreover, the purchaser of the divested

[58] There was also testimony that it would not be possible to withdraw from the files of respondent's Washington Regional Center the data base obtained as a result of the acquisition of CBDC. However, the context of this remark suggests that segregation would be impossible because new information which is constantly added to the files could not be isolated, a fact we consider irrelevant, *see* pp. 45–46 *infra*, and because of the presence of what we assume to be a relatively small pre-existing data base respondent had in Annapolis, Maryland, prior to the acquisition of CBDC. (Tr. 11885, 11888–90.) Indeed, the president of CBI of Georgia testified that "[w]e have always had the capability to identify the files of any particular credit bureau." (Tr. 12, 736.) Therefore, as far as we can tell from the record, it is only with respect to Portland that there is a serious problem of "scrambled" assets that would preclude the restoration of competition by means of a simple divestiture.

[59] Once respondent left the market, it would not be in a position to provide the kind of meaningful assistance described *infra*.

[60] The presumption has not been overcome with respect to CB West Coast's other offices and we are, therefore, ordering divestiture of the entire chain, except for the Portland bureau.

[61] It would make little sense to direct respondent simultaneously to find a purchaser of the bureaus and assist in the establishment of a new bureau. We would prefer to see respondent's attentions directed to the restoration of competition in Portland. Moreover, until divestiture of the bureaus is completed, the market would likely be so unsettled that a new firm might be deterred from entering.

properties on the West Coast might well choose to integrate a newly-established credit bureau in Portland into its chain of bureaus.[62] [43]

The judge recommended that respondent be forced to divest the entire CB West Coast chain except for CB Metro, the San Francisco bureau. We agree, except that we will permit respondent to retain its Portland bureaus and will direct it to divest the San Francisco bureau.[63] The law judge premised this recommendation upon his conclusion that "a package encompassing the entire Pacific Northwest region is likely to enhance the salability of the business to be divested, thus insuring a speedy implementation of the remedy. . . ." (I.D. p. 148.) It is within our power and, indeed, it is our obligation to order divestiture of assets necessary to assure the viability and attractiveness to would-be purchasers of the divested entity. *See OKC Corp. and Oklahoma Land and Cattle Co.*, 77 F.T.C. 1342, 1427 (1970), *aff'd*, 455 F.2d 1159 (10th Cir. 1972). As we have recently noted, "the government will rarely be in a position to knowledgeably carve up a company into viable components. The most that can generally be asserted with any degree of confidence is that the acquired company was a viable competitor before its acquisitions, and is thus likelier than any of its possible parts to be a viable competitor in the future." *Fruehauf, supra*, at 35–36. [44]

Here, it is far from clear that the individual bureaus in Tacoma or San Francisco would be viable by themselves. This would turn on such factors as their individual profit levels during the years immediately preceding divestiture and the extent to which their successful operation is dependent on their linkage with other bureaus. In this connection, we note respondent's argument about the adverse effect divestiture of the San Francisco bureau and other

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[62] The files and tapes, however, need not be sold to the purchaser of the CB West Coast chain if a different, suitable purchaser can be found.

In dismissing the allegation that the acquisition of CB West Coast eliminated respondent as a potential entrant into the Portland market, the ALJ found that "[i]t would have been extremely difficult for a company to have entered the Portland local credit reporting market in 1969 or 1970 in competition with CB Portland." He cited the testimony of local credit grantors that CB Portland satisfied their need for credit information, that they would not have cooperated with another credit bureau and that they preferred to deal with one central source of information rather than with two competing bureaus. (I.D. f. 196.) However, one of the credit grantor witnesses testified that he would not cooperate with another bureau *unless* that bureau was financially strong and could provide accurate credit information promptly and at a good price. (Tr. 1952.) Other witnesses expressed concern about the extra costs of providing information to two different bureaus. We think it likely that, as in other markets which have been able to support more than one large consumer credit reporting firm, a new bureau will be able to compete successfully in this market provided that it offers customers a reasonably comprehensive service — and our order's requirement that respondent sell its computerized tapes should make this possible during the critical beginning years of the bureau — and that it offers its services at a price low enough to compensate credit grantors for whatever extra inconvenience they experience in dealing with a second bureau.

As the ALJ correctly found, CB West Coast had been a significant competitor in this market. A new entrant, with the assistance of respondent's files and computerized tapes, can be expected to be at least as significant.

[63] We cannot discern any justification for the ALJ's prohibition against respondent's divesting the CB West Coast chain to the purchaser of CBDC. Whether a proposed sale of CB West Coast will restore competition will depend on a variety of factors. We do not see how a prospective purchaser's ownership of CBDC (by reason of the mandated divestiture) could be a disqualifying fact.

bureaus in the Pacific Northwest would have on its over-all profitability and its ability to support its present computer capability. *See* p. 40 *supra*. The efficiencies resulting from a multiple bureau operation, including the ability to support a large computer capacity, would presumably be as relevant to a purchaser of CB West Coast as it is to the present owner.

The ALJ's order also requires divestiture of offices engaged solely in debt collection activities. Although the effect of the CB West Coast acquisition on debt collection markets was not a subject of this proceeding,[64] the record does indicate that collection records are a useful source of information for a credit bureau. (Tr. 1010–11, 1039; I.D. f. 208.) We are unable to conclude from this record that the collection offices will not contribute significantly to the viability of the divested entity. The presumption in favor of divestiture has, therefore, not been overcome.[65] [45]

With a few exceptions, the judge's other proposed ancillary relief provisions are clearly justified. Contrary to respondent's argument, we do not understand paragraph I[66] of the ALJ's order to require that old files, which, in the ordinary course of business, have been purged or updated,[67] be restored to their original condition. This would be an absurd reading of the order. Nor does paragraph II[68] require that respondent "revert to the operating system in effect at the time the complaint was issued. . . ." (R. Ans. 58). This provision only prohibits "commingling" of assets and changes that "impair or otherwise adversely affect" the strength of the businesses to be divested.

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[64] We understand complaint counsel's statements that debt collections are not relevant to this case (*e.g.*, Tr. 676) to be a stipulation that the anticompetitive effects of the acquisitions on the collection business were not a subject of this case. The "stipulation" cannot be read to preclude complaint counsel from asserting that total divestiture of CB West Coast, including divestiture of collection offices, was appropriate. It is respondent's burden to rebut the presumption in favor of total divestiture and respondent cannot rely on this stipulation to meet that burden.

[65] We are modifying paragraph II of the proposed order to make it clear that CB West Coast must be divested as a unit.

The marketplace is the forum in which questions of economic viability can be ultimately decided. Section 3.72 of the Commission's Rules of Practice permits a party under order to seek reopening of the order if it can demonstrate that changed circumstances so warrant. If Equifax can, contrary to what now appears likely, secure a purchaser (or, for that matter, more than one purchaser) of a less complete divested entity, and can show that the purchase (or purchases) will be able to restore competition in the markets in which violations have been found, the Commission will consider reopening the order. The filing of such a petition will not constitute grounds for delay of respondent's obligation under the order to divest all of CB West Coast, except for the Portland bureau.

[66] Paragraph I requires in part that "[a]ny assets or properties of any acquired firm required to be divested that have been substantially disposed of or commingled with Retail Credit's assets or properties since acquisition including computerized credit files, shall be restored or recreated prior to divestiture and included in the assets and properties to be divested."

[67] The Fair Credit Reporting Act, §605, 15 U.S.C.1681C, prohibits "consumer reporting agencies" from making consumer reports which include adverse information which is more than seven years old.

[68] "Pending completion of such divestitures, Retail Credit shall not commingle any assets, properties, financing, business or operations of any acquired assets and business required to be divested with its own, and shall take no steps to impair or otherwise adversely affect the economic, competitive and financial strength of any business required to be divested."

The requirement of paragraph I that respondent divest "all additions and improvements to the acquired firms which have been added since the acquisitions" is fully justified. "An industry does not remain frozen during the period of unlawful retention of the acquired company and divestiture of an outmoded firm with no chance of survival makes neither technological nor competitive sense. The Commission may properly order that the acquired firm be recreated in such form as would reflect the firm's probable growth, including improvements it may have added itself." *Reichhold Chemicals, Inc.*, FTC Dkt. 9076 (final order issued Feb. 22, 1978) at 75 (Initial Decision) [91 F.T.C. 246]. *See also United States* v. *Aluminum Co. of America*, 247 F. Supp. 308, 316 (E.D. Mo. 1964), *aff'd mem.*, 382 U.S. 12 (1965). This is especially true with respect to the files since, as respondent has pointed out, a [46] credit bureau cannot operate without a current and reasonably extensive data base. Moreover current files, including files covering areas adjacent to that covered by the original data base, are not really "new" but are built upon the acquired base.[69]

The ALJ would also impose a ban on respondent's entering into management contracts with the divested businesses for a period of ten years. Under these contracts, the managed bureau apparently decides such vital questions as the price to be charged for the bureau's services and the location of its offices. Moreover, respondent does not obtain access to the files of the managed bureau. (Tr. 12, 858–61.) Nonetheless, the anticompetitive potential of such arrangements is obvious. While the bureau sets guidelines as to which customers may receive its services, respondent, working within these guidelines, apparently actually selects new customers. (Tr. 12, 861–62.) Moreover, under some of respondent's management contracts, the managed bureau pays Equifax a percentage of its profits. (Tr. 12, 453.) If respondent were compensated in this manner in cities in which it was competing, its fee for providing management services to a credit bureau would decline as it provided more vigorous competition and ate into the managed credit bureau's volume and profits. We simply cannot see how competition could flourish in markets where one firm helps manage the business of its principal, or only, competitor.[70] [47]

Nor do we agree with respondent that a ten-year prohibition on

[69] According to respondent, ". . .[E]xpansion into adjacent geographic areas is feasible. . .because an existing, income producing, data base and facilities are used with existing credit grantor customers already providing information and purchasing reports who are themselves expanding into adjacent areas and encouraging bureau expansion. . . ." (RAB 44 n. 33, citation omitted.)

[70] Of course, there may be some kinds of agreements (other than automation contracts, which are not prohibited by our order) that involve so little "management" that they could not interfere with the restoration of competition. Whether or not a particular contract would violate the order may be addressed during the compliance

(Continued)

acquisitions without prior Commission approval is inappropriate. The Commission has authority to impose such a requirement, *Abex Corp.* v. *FTC*, 420 F.2d 928 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970), and, in view of the fact that we have found three acquisitions to have had anticompetitive consequences in four different geographic markets, we believe this relief is necessary to prevent future violations and that it should not be limited to the particular geographic markets in which violations were established.[71]

Because of the availability of civil penalties to enforce the order, we do not believe that a case has been made for the absolute prohibition in paragraph V of the ALJ's order of any acquisitions of businesses engaged in credit reporting pending completion of the mandated divestitures. See *Avnet, supra*, 82 F.T.C. at 479. This paragraph will be deleted.

An order consistent with this opinion is attached.

FINAL ORDER

This matter has been heard by the Commission upon the appeals of complaint counsel and Retail Credit Company ("respondent") from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying opinion has denied, in larger part, the appeal of respondent and granted, in larger part, the appeal of complaint counsel.

It is ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent inconsistent with, and as indicated in, the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to divest and to cease and desist be, and it hereby is, entered:

ORDER

I

It is ordered, That respondent, a corporation, and its directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall divest all stock, assets, properties, rights and

phase. Rules of Practice, Section 3.61(d).

We are modifying the ALJ's order to limit the prohibition to the four markets in which we have found that the acquisitions had anticompetitive consequences.

[71] The ten-year ban will run from the effective date of this order rather than from the date of approval of the last divestiture, as provided in paragraph VI of the judge's order.

privileges and interests of whatever nature, tangible and intangible, acquired by respondent [2] as the result of its acquisitions of stock or assets of Credit Bureau, Inc., of Salem, Oregon ("CB West Coast") and The Credit Bureau of Washington, D.C., together with all additions and improvements to the acquired firms which have been added since the acquisitions of such firms. Such divestiture shall include the removal from all manual and computerized records of respondent all credit information obtained as a result of the acquisitions, and all additions and improvements to the acquired firms' credit information added since the acquisitions, *provided, however,* that respondent shall be permitted to retain the credit reporting and related assets and business of Credit Bureau Metro, Portland, including all additions and improvements thereto since the acquisitions. Any assets or properties of any acquired firm required to be divested that have been substantially disposed of or commingled with respondent's assets or properties since acquisition, including computerized credit files, shall be restored or recreated prior to divestiture and included in the assets and properties to be divested. Such divestiture shall be absolute and shall be accomplished no later than one (1) year from the date this order shall become final and shall be subject to the prior approval of the Federal Trade Commission.

II

It is further ordered, That each divestiture required by Paragraph I of this order shall be accomplished absolutely to an acquirer approved in advance by the Federal Trade Commission so as to transfer CBDC and the portion of CB West Coast to be divested as going businesses and as viable concerns engaged in the gathering and reporting of credit information on individuals to business firms. The assets and business pertaining to CB West Coast required to be divested shall be divested as a single unit.

III

Pending completion of such divestitures, respondent shall not commingle any assets, properties, financing, business or operations of any acquired assets and business required to be divested with its own, and shall take no steps to impair or otherwise adversely affect the economic, competitive and financial strength of any business required to be divested.

IV

It is further ordered, That respondent, within one year from the effective date of this order, shall enter into an agreement with a purchaser, the purchaser and the terms of the agreement to be approved by the Commission, whereby respondent shall, in good faith supply to the purchaser, during a period of three (3) years beginning on a date to be determined by the purchaser, copies of its then current credit files in a form which will permit said purchaser to prepare and sell credit [3] reports concerning residents of the Portland, Oregon metropolitan area (the city of Portland and Washington, Multnomah and Clackamas counties in Oregon and Clark county in Washington).

V

It is further ordered, That the divestitures and sale required by Paragraphs I, II and IV of this order shall not be effected, directly or indirectly, to any person who is an officer, director, employee or agent of, or otherwise under the control or influence of, respondent or who owns or controls directly or indirectly, more than one (1) percent of the outstanding stock of respondent.

VI

It is further ordered, That for a peiod of ten (10) years from the effective date of this order respondent shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, or any interest in or any interest of, any concern engaged in the gathering and reporting of credit information on individuals to business firms in the United States, nor shall respondent enter into any arrangement with any such concern by which respondent obtains the market share, in whole or in part, of such concern.

VII

It is further ordered, That respondent, for a period of ten (10) years from the effective date of this order, shall not enter into a contract to manage bureaus divested, pursuant to Paragraphs I and II, or to which credit information was sold pursuant to Paragraph IV, at least two thousand (2000), or twenty (20) percent, of whose files concern residents of either the San Francisco Bay metropolitan area (San Francisco, San Mateo, Santa Clara, Alameda, Marin, Solano,

Napa, Sonoma and Contra Costa counties in California); the Tacoma, Washington metropolitan area (Pierce County, Washington); the Portland Oregon metropolitan area (the city of Portland, Washington, Multnomah and Clackamas counties, Oregon and Clark county, Washington); or the Washington, D.C. metropolitan area (the District of Columbia, Montgomery and Prince George's counties in Maryland, Arlington and Fairfax counties in Virginia, and the cities of Alexandria and Falls Church in Virginia), *provided, however,* that nothing contained in this order shall be construed to prohibit respondent from bidding for an automation service contract in competition with other firms offering automation service contracts, with any purchaser of any business divested pursuant to this order.

VIII

It is further ordered, That within thirty (30) days from the effective date of this order and every sixty (60) days thereafter [4] until the divestitures and the sale required by Paragraphs I, II and IV, are accomplished respondent shall submit, in writing, to the Federal Trade Commission a verified report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with the order. All compliance reports shall include, among other things that are from time to time required, (a) the steps taken to accomplish the required divestiture and sale; and (b) copies of all documents, reports, memoranda, communications and correspondence concerning or relating to the divestiture and sale.

With respect to Paragraph VI of this order, respondent shall on the first anniversary date of the effective date of Paragraph VI and each anniversary date thereafter until the ten (10) year period shall have expired, submit a report, in writing, listing all acquisitions or mergers made by it, the date of each such acquisition or merger, the products involved, and such additional information as may from time to time be required by the Federal Trade Commission.

IX

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a corporate successor.

Commission Pitofsky did not participate.

IN THE MATTER OF

LEVI STRAUSS & CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9081. Complaint, May 5, 1976 — Decision, July 12, 1978

This consent order, among other things, requires a San Francisco, Calif. clothing manufacturer to cease establishing and enforcing resale price agreements; soliciting the identities of recalcitrant dealers; and threatening, penalizing or terminating such dealerships. Further, the firm is prohibited from unfairly restricting the use of its trademark; engaging in unlawful tie-in practices; and disseminating any materials suggesting resale prices for five years.

Appearances

For the Commission: *David M. Newman, Paul D. Hodge* and *Jeffrey A. Klurfeld.*

For the respondent: *Heller, Ehrman, White & McAuliffe,* San Francisco, Calif. and *Howrey & Simon,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C. Title 15, Section 14, *et seq.,* as amended), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Levi Strauss & Co., a corporation, hereinafter referred to as "respondent," has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

For purposes of this complaint, the following definitions shall apply:

"Product" is defined as any item of wearing apparel and any related accessory which is manufactured, offered for sale, or sold by Levi Strauss & Co.

"Dealer" is defined as any person, partnership, corporation or firm which purchases any product from Levi Strauss & Co. for resale.

"Prospective Dealer" is defined as any person, partnership, corporation or firm which may desire to purchase any product from Levi Strauss & Co. for resale but has not been accepted by Levi Strauss & Co. as a dealer.

PARAGRAPH 1. Respondent Levi Strauss & Co. is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Delaware, with its principal office and place of business at 2 Embarcadero Center, San Francisco, California.

PAR. 2. Respondent is now and has been for many years engaged in the manufacture, sale and distribution of a wide variety of wearing apparel for men, women and children, including but not limited to jeans, slacks, shorts, shirts, jackets and related items. Gross sales by respondent for the 1975 fiscal year exceeded $1,000,000,000. Respondent claims to be the largest apparel manufacturer in the world.

PAR. 3. Respondent sells and distributes its products directly to more than 15,000 retail dealers located throughout the United States who in turn resell respondent's products to the general public.

PAR. 4. Respondent maintains a comprehensive and integrated manufacturing, sales and distribution system throughout the United States. Sales of respondent's products are effectuated through seven regional sales offices located in New York, New York; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Los Angeles, California; San Francisco, California, and Seattle, Washington. More than 500 salesmen working under control of these regional sales offices sell respondent's products throughout the United States.

Respondent also maintains manufacturing plants located in the States of California, New Mexico, Texas, Tennessee, Arkansas, Mississippi, Georgia, Virginia, North Carolina, Missouri, and Louisiana. Respondent transports its products, either directly from its manufacturing plants located in the aforementioned States to dealers or from these manufacturing plants to warehouses located in California, Texas and Kentucky, and from there, distributes such products to its dealers located in every State of the United States and the District of Columbia. There is now and has been at all times mentioned in this complaint, a pattern and course of commerce in respondent's products which is in and affects interstate commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, sale and distribution of wearing apparel similar to that listed and described in Paragraph Two hereinabove.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States, the purpose or effect of which is and has been to fix, control, establish, manipulate and maintain the resale prices at which its dealers advertise, offer for sale and sell its products.

PAR. 7. By various means and methods, respondent has effectuated and enforced the aforesaid practice and policy by which it can and does fix, control, establish, manipulate and maintain the resale prices at which its products are advertised, offered for sale and sold by its dealers. To carry out said practice or policy, respondent adopted and employed, and still employs, the following means and methods among others:

(a) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will adhere to those resale prices established or suggested by respondent for its products.

(b) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will not advertise any of respondent's first-line quality products, whether or not in conjunction with any of respondent's trademarks, at resale prices other than those respondent has established or suggested.

(c) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will not advertise any of respondent's second-line quality or irregular products as having been manufactured by respondent.

(d) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent or to give oral assurances to respondent, that they will not resell respondent's products to any retailer not authorized by respondent to sell its products.

(e) It has established and employed, and still employs, a surveillance system, the purpose of which is to ascertain whether any dealer, prospective dealer, person or firm is engaged in any of the following activities:

(1) offering for sale or selling any product at a price other than that which respondent has established or suggested.

(2) advertising any first-line quality product, whether or not in conjunction with any of respondent's trademarks, at a price other than that which respondent has established or suggested.

(3) advertising any second-line quality or irregular product as having been manufactured by respondent.

(4) reselling any product to any retailer not authorized by respondent to sell its products.

(f) As part of the surveillance system as set forth in subparagraph (e) hereinabove, respondent has:

(1) Solicited and encouraged the cooperation and assistance of dealers to identify and report any dealer, prospective dealer, person or firm who engages in any of the activites set forth in subparagraph (e)(1)–(4) hereinabove.

(2) Shopped retailers not authorized by respondent to sell its products who are selling *any* product in order to ascertain from which dealer said retailers obtained said product.

(g) It warns, intimidates, harasses and uses various forms of coercion and discipline, including but not limited to delaying order shipments, restricting the availability of products, limiting the frequency of salesmen's visits, and threatening termination, against dealers engaged in, or suspected of engaging in, any of the activities set forth in subparagraph (e)(1)–(4) hereinabove.

(h) It terminates dealers engaged in, or suspected of engaging in, any of the activities set forth in subparagraph (e) (1)–(4) hereinabove.

(i) It refuses to deal with certain prospective dealers for the reason that respondent believes that such prospective dealers will engage in any of the activities set forth in subparagraph (e)(1)–(4) hereinabove.

(j) It prohibits any dealer from being reimbursed pursuant to respondent's cooperative advertising program for any advertisement offering any product at a price other than that which respondent has established or suggested.

(k) It misrepresents to dealers that its products are fair traded and that dealers must, as a matter of law, adhere to respondent's established resale prices.

The above are among the various means and methods which have been used, and are now being used, by respondent in the enforcement of its system of maintaining resale prices, all with the result that said prices have been and are generally observed and maintained by dealers handling respondent's products.

PAR. 8. The aforesaid acts and practices have had and still have the capacity, tendency and effect of hindering, suppressing or eliminating competition between or among all dealers selling respondent's products, by requiring them to resell the same at prices fixed or controlled by respondent as aforesaid; such practices prevent dealers from selling these products at prices of their own choosing; hinder and suppress price competition in the resale of such products

in the various States of the United States and the District of Columbia, thus tending to obstruct the free and natural flow of commerce and the freedom of competition in the channels of interstate commerce.

PAR. 9. In the course and conduct of its business as above described, respondent has refused to sell and continues to refuse to sell its blue denim jeans to dealers and prospective dealers desirous of purchasing said products unless said dealers and prospective dealers also purchase certain other products manufactured by the respondent.

Further, through the use of an allocation program, respondent has refused to and continues to refuse to increase the allotments of its blue denim jeans to dealers unless said dealers also purchase or increase their purchases of certain other products manufactured by respondent.

PAR. 10. The aforesaid acts and practices of the respondent have the tendency to unduly hinder competition; have injured, hindered, suppressed, lessened or eliminated actual and potential competition, and thus are to the prejudice and injury of the public; and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by an

interested person pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Levi Strauss & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Two Embarcadero Center, San Francisco, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this order, the following definitions shall apply:

"Product" is defined as any item of wearing apparel and any related accessory which is manufactured, offered for sale or sold by Levi Strauss & Co.

"Dealer" is defined as any person, partnership, corporation, or firm authorized by Levi Strauss & Co. to sell any product.

"Prospective dealer" is defined as any person, partnership, corporation or firm which may desire to purchase any product from Levi Strauss & Co., but has not been accepted as a dealer.

It is ordered, That respondent Levi Strauss & Co., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, offering for sale, sale, distribution or advertising of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

I

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the price at which any dealer may advertise, promote, offer for sale or sell any product at retail.

2. Establishing, exacting any assurance to comply with, continuing, enforcing, or announcing the terms of any contract, agreement, understanding, or arrangement with any dealer or prospective dealer which fixes, establishes, maintains or enforces the price at which any product is to be sold or advertised at retail by such dealer or prospective dealer.

3. Securing or attempting to secure any promise or assurance from any dealer or prospective dealer regarding the retail price at which such dealer or prospective dealer will or may advertise or sell any product, or requiring or requesting any dealer or prospective dealer to obtain approval from respondent for any retail price at which such dealer or prospective dealer may or will advertise or sell any product.

4. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify because of the retail price at which said dealer advertises or sells any product.

5. Requiring or soliciting any dealer or prospective dealer to report the identity of any dealer, prospective dealer, person or firm because of the retail price at which such dealer, prospective dealer, person or firm is advertising, offering to sell or selling any product; or acting on any reports or information so obtained by threatening, intimidating or coercing any dealer, prospective dealer, person or firm, or by terminating any dealer.

6. Conducting any surveillance program to determine whether any dealer, prospective dealer, person or firm is advertising, offering for sale or selling any product at a retail price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control, or enforce the retail price at which any product is sold or advertised.

7. Terminating or taking any other action to restrict, prevent, or limit the sale of any product by any dealer because of the retail price at which said dealer has sold, is selling, or is suspected of selling such product.

8. Terminating or taking any other action to restrict, prevent, or limit the sale of any product by any dealer because of the retail price at which said dealer has advertised, is advertising, or is suspected of advertising any product, whether or not in conjunction with any of respondent's trademarks.

9. Fixing, establishing, controlling or maintaining the retail price at which any product is advertised, promoted, offered for sale or sold, by means of any of the following:

a. Threatening or coercing any person, firm or prospective dealer because of the retail price at which said person, firm or prospective dealer, has sold, is selling or is suspected of selling any product.

b. Threatening or coercing any person, firm or prospective dealer, because of the retail price at which said person, firm or prospective dealer has advertised, is advertising or is suspected of

advertising any product, whether or not in conjuction with any of respondent's trademarks.

c. Controlling or restricting in any manner, including by termination of any dealer, any customer or class of customers to whom any dealer may sell any product, where such control or restriction is exercised because of the retail price at which the customer or class of customers to whom said product has been resold has advertised, promoted, offered for sale or sold such product.

II

Publishing, disseminating, circulating or providing by any means, any suggested retail price for a period of five (5) years after the date on which this order becomes final; *provided, however,* that, if, after said five (5) year period, respondent suggests any retail price, respondent shall:

a. Clearly and conspicuously state on any material on which such suggested price is stated that such price is suggested only.

b. Mail to all dealers a letter stating that no dealer is obligated to adhere to any suggested retail price and that such suggested retail price is advisory only.

III

1. Restricting any dealer, prospective dealer, person, or firm who purchases any product which respondent had denominated irregular or second quality from offering for sale or advertising such products as "second quality or irregular products manufactured by Levi Strauss & Co."

2. Restricting any dealer, prospective dealer, person or firm who has purchased any product which respondent had denominated "closeout" and which bears any of respondent's trademarks affixed thereto from using any trademark so affixed in the sale or advertising of such product.

3. Nothing contained in Paragraph III of this order shall affect respondent's rights in law and equity respecting the protection of respondent's trademarks in conjunction with the offer for sale or advertising of any product.

IV

It is further ordered, That respondent shall forthwith cease and desist from:

1. Engaging in any unlawful tie-in selling practice.

2. Establishing or administering an allocation program under

which a dealer's entitlement to any product which such dealer has not previously purchased, is dependent upon the volume of such dealer's purchases of a different product style or a group of different product styles.

V

It is further ordered, That respondent shall:

1. Within thirty (30) days after service of this order, mail under separate cover a copy of this order and a copy of the enclosure set forth in the attached Exhibit A to every present dealer. An affidavit of mailing shall be sworn to by an official of respondent verifying that said mailing of the order and of the enclosure in the attached Exhibit A was completed.

2. Mail under separate cover a copy of this order and a copy of the enclosure set forth in the attached Exhibit A to any person partnership, corporation or firm that within five (5) years after service of this order becomes a new dealer.

3. Within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales representatives and advertising agencies retained by respondent and secure from each such entity or person a signed statement acknowledging receipt of said order.

VI

It is further ordered, That respondent, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

Commissioner Pitofsky did not participate.

EXHIBIT A

Dear Levi Strauss Retailer:

Levi Strauss & Co. has consented to the entry of an Order by the Federal Trade

Commission. In connection therewith Levi Strauss & Co. has agreed to send you this letter describing the provisions contained in the Order. A copy of the Order is enclosed.

The Order provides, among other things, as follows:

1. With respect to retail prices:

a. You are free to sell and advertise products purchased from Levi Strauss & Co. at any price you choose.

b. Levi Strauss & Co. cannot take any action against you, including termination, because of the retail price at which you sell or advertise its products.

c. Levi Strauss & Co. cannot suggest retail prices for any product until [five years from date on which the Order becomes final].

d. You are free to participate in any cooperative advertising program sponsored by Levi Strauss & Co. for which you otherwise qualify and to recieve any advertising credit or allowance allowed thereunder regardless of the price at which you advertise any product from Levi Strauss & Co.

e. You may use any of Levi Strauss & Co.'s trademarks in a lawful manner in conjunction with the advertising of any first-line products at any price you choose. For example you may advertise any product bearing the "Levi's(r)" trademark as "Levi's(r)."

f. You may sell or advertise any Levi Strauss & Co. irregular or second quality merchandise as "irregular or second quality merchandise manufactured by Levi Strauss & Co." However, Levi Strauss & Co. reserves the right to restrict the use of its trademarks in connection with the sale or advertising of such merchandise.

g. In connection with the advertising or sale of Levi Strauss & Co. "close-outs," you may use, in a lawful manner, the trademarks, if any, affixed to such close-out products. You may also advertise or sell these products as "close-outs manufactured by Levi Strauss & Co."

h. Levi Strauss & Co. cannot control or restrict the customers to whom you or any other dealer may sell any product where such control or restriction is exercised because of the retail price at which the customer to whom said product has been resold is advertising or selling such product.

2. With respect to other sales practices:

a. Levi Strauss & Co. cannot engage in any unlawful tie-in selling practices.

b. If Levi Strauss & Co. places any product style on allocation, your allotment of such product style, other than a product style you have not previously purchased, will not be dependent upon the volume of your purchases of a different product style or a different group of product styles.

If you have any questions regarding the contents of this letter or the attached Order, please contact Mr. ———— at Levi Strauss & Co.

IN THE MATTER OF

TENNECO, INC.

Docket 9097. Interlocutory Order, July 12, 1978

This order sets forth specific provisions to be followed relative to the designation of certain documents as exempt from release.

ORDER REGARDING REQUEST FOR DESIGNATION OF DOCUMENTS AS EXEMPT FROM RELEASE

On March 22, 1978, Sears, Roebuck and Co. ("Sears") filed a motion to quash a third party subpoena duces tecum served upon it, claiming, *inter alia,* that the protective order issued by the administrative law judge ("ALJ") in this proceeding was insufficient to protect it from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552 (1970). The ALJ denied the motion to quash from the bench on April 25, 1978, on the assumption that the Commission would not release confidential information covered by the protective order. The transcipt of the ALJ's ruling indicates that he recognized a limitation upon his authority with respect to FOIA disclosure. Sears filed a motion for reconsideration on May 3, 1978, arguing again, *inter alia,* that the protective order was inadequate, and that the ALJ was without authority to bind the Commission with respect to disclosure under the FOIA. Alternatively, Sears asked the ALJ to certify the matter to the Commission under Rule 3.23(b). By order of May 10, 1978, the ALJ denied the motion for reconsideration and found that the matters raised by Sears did not involve a controlling question of law or policy which would justify certification of an immediate appeal under Rule 3.23(b). The ALJ did not address in his order whether the confidentiality issue was within his authority to decide or should be forwarded to the Commission under Rule 3.22(a). By motion of May 22, 1978, directly to the Commission, Sears asks that the Commission enter an order designating documents produced in response to Specifications 5 and 8[1] as confidential and not subject to future release, noting that the ALJ cannot bind the Commission with respect to release of information under the FOIA.

The chronology of actions with respect to the subpoena duces tecum served upon the J. C. Penney Company ("Penney") charts a similar sequence of events. Penney filed a motion to quash on April

[1] Specification 5 requires production of documents showing, by part number, the net purchase price paid by Sears to Maremont, its supplier, for shock absorbers in 1975 and 1976. Specification 8 requests, *inter alia,* production of Sears' Redetermination Audit for 1975 which contains a summary of the price information requested in Specification 5.

25, 1978, claiming that the protective order issued by the ALJ provided insufficient protection for documents responsive to Specifications 1–5 and 7–8 of the subpoena. By order of May 9, 1978, the ALJ denied Penney's motion for the same reasons he rejected Sears' motion to quash. Penney then moved directly before the Commission for designation of the information produced in response to Specification 5 of the subpoena[2] as confidential information exempt from release under the Freedom of Information Act and as not subject to release or disclosure by the Commission.

Normally, the Commission would not entertain an interlocutory appeal on a discovery question in the absence of a certification by the ALJ. However, it is clear in this instance that under Rule 4.10(a)(2) the ALJ does not have authority to bind the Commission with respect to the release of documents[3] and that these motions should have been certified, with the ALJ's recommendation, pursuant to Rule 3.22(a). Because remand of these motions to the ALJ would unnecessarily delay the administrative proceeding, the Commission, in its discretion, has considered both motions and issues the following order:

Notwithstanding any of the provisions of the protective order issued by the ALJ on January 9, 1978, in the event of a Freedom of Information Act request or an official request from any Congressional committee or subcommittee or from a court pursuant to compulsory process, for disclosure of any document or portion of any document submitted by Sears in response to Specification 5 of the subpoena duces tecum or to Specification 8, to the extent such information summarizes information provided pursuant to Specification 5, and by Penney in response to Specification 5 of the subpoena duces tecum, and which is designated as "Confidential" under said protective order, authorized representatives of the Commission's Office of General Counsel may inspect such document for purposes of considering the request and, where necessary, advising the Commission on the request and defending the Commission's interests in court. Furthermore, the Commission shall provide the party which supplied such "Confidential" document or portion thereof with ten (10) days' notice prior to release of such document or portion thereof in response to such a request or otherwise. *Provided, however,* that in the case of release of such document or portion thereof, designated as "Confidential," in response to

[2] Specification 5 requires production of Penney's net cost per item of shock absorbers and exhaust system parts for 1975 and 1976.

[3] Such authority would be granted to the ALJ under the Commission's proposed confidentiality rules. 43 F.R. 3571 (January 26, 1978).

an official request from a committee or subcommittee of Congress or to a court in response to compulsory process, the Congressional committee or subcommittee or the court will be advised that the party which supplied the document considers the material to be confidential and the party will be provided ten days' prior notice where possible, and in any event as much advance notice as can reasonably be given.

It is so ordered.

IN THE MATTER OF

LUSTRASILK CORPORATION OF AMERICA, INC., ET AL.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2894. Decision, Jan. 27, 1976 — Modifying Order, July 13, 1978.

This is an order which modifies a cease and desist order issued January 27, 1976, 41 FR 7744, 87 F.T.C. 145, to conform with the product coverage of a consent order issued against a competitive company, by substituting the words "hair straightening products" for the word "cosmetics" in Sections I and II of the original order, and "is " for "are" in the *It is ordered* paragraph in Section I; and by deleting the words "as 'cosmetic' is defined in the Federal Trade Commission Act" in the *It is further ordered* paragraph in Section II.

ORDER MODIFYING ORDER TO CEASE AND DESIST

ORDER*

On April 26, 1977, respondents in this matter requested by letter that the Commission order of January 27, 1976, be modified, first by limiting the product coverage of the order to "hair straightening products" which would replace the broader "cosmetics" products description, and second, by excluding the individually named respondents from the order.

Complaint counsel support the limitation on product coverage and oppose the exclusion of the individually named respondents.

We agree that the product coverage should be limited as requested. After entry of its order in this matter the Commission issued a consent order against Revlon, Inc., a competitor of Lustrasilk in the sale of hair relaxers. The Revlon order's product coverage is identical to that recommended by complaint counsel here. For this reason the Commission believes that it is in the public interest to grant the modification of product coverage sought by Lustrasilk.

We reject respondents' request that the individually named respondents be released from the order. Nothing that respondents have cited indicates a change of facts or law that would warrant the exclusion of the two individually named respondents from the reach of the order, nor does it appear that the public interest would be served by their exclusion. To the contrary, because the corporation is run as the proprietorship of the two named individuals, we find it necessary to continue to hold them responsible under the order. Accordingly,

* Reported as modified by Commission *Order Correcting Order Modifying Order to Cease and Desist* issued August 7, 1978.

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the words "hair straightening products" for the word "cosmetics" in Sections I and II of the order, by substituting "is" for "are" in the *It is ordered* paragraph in Section I, and by deleting the words "as 'cosmetic' is defined in the Federal Trade Commission Act" in the *It is further ordered* paragraph in Section II.

It is further ordered That the order to cease and desist be, and it hereby is, modified by substituting "any hair straightening product" for "any such product" in Paragraph I.A.3; by deleting the words "safety or" and substituting "hair straightening product" for "cosmetic" in Paragraph I.B.; and adding a new Paragraph I.C. and renumbering subsequent paragraphs accordingly, as follows:

> "Representing, in any manner, the safety of any hair care product, or the ingredients therein, unless at the time such representation is made respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body."

Commissioner Pitofsky did not participate.

IN THE MATTER OF

MEGO INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2924. Complaint, July 14, 1978 — Decision, July 14, 1978

This consent order, among other things, requires a New York City manufacturer of a "Cher" mannequin doll and other toy products to cease employing any representation that depicts children using electrical toys or appliances near water or other fluids, without adult supervision, or which may induce children to engage in behavior that creates risk of injury.

Appearances

For the Commission: *Robert C. Goldberg.*

For the respondents: *Howard Alterman, Spivack & Lasky,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mego International, Inc., a corporation, and Mego Corporation, a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mego International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1 Madison Square Plaza, New York, New York.

PAR. 2. Respondent Mego Corporation is a corporation organized, existing and doing business under and by virtue of the place of business located at 1 Madison Square Plaza, New York, New York.

PAR. 3. Respondents are now, and for all times relevant to this complaint have been engaged in the production, distribution, and sale of a variety of toy products, including but not limited to, "Cher", a mannequin doll.

PAR. 4. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising material, including, but not limited to, the advertising referred to herein, to promote the sale of Cher.

PAR. 5. In the course and conduct of their aforesaid businesses,

respondents cause and have caused Cher in its package to be transported from its place of business to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained, a substantial course of trade in said product in or affecting commerce.

PAR. 6. In the course and conduct of their aforesaid businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said product by various means in or affecting commerce including, but not limited to, television advertisements broadcast by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product, and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including, but not limited to, the aforesaid media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in or affecting commerce.

PAR. 7. Typical and illustrative of the statements and representations in respondents' advertisements disseminated by means of television, but not all inclusive thereof, is the "Cher Wash N Dry" advertisement. In this advertisement, as the female narrator states, "You can wash Cher's hair, and ask mom to blow dry it with you. Her hair will be soft and fluffy," a young girl, about six or seven years of age, sits next to a bathroom sink filled with water and washes the doll's hair in the sink. As she holds the doll in her right hand, a woman (presumably her mother) enters the scene and hands the girl an electrical pistol hairdryer which the girl takes with her left hand. The mother withdraws from the scene and the girl proceeds to dry the doll's hair.

PAR. 8. The aforesaid advertisement has the tendency or capacity to influence children to engage in the following behavior with respect to the use of electrical appliances and toys.

A. Using, participating in the use of, or present at the time of the use of a small electrical appliance in close proximity to a pool or body of water or other fluid.

B. Using, participating in the use of, or present at the time of the use of an electrical personal grooming appliance without the close and watchful supervision of an adult.

Therefore, such advertisement has the tendency or capacity to

induce behavior which is harmful or involves an unreasonable risk of harm, and was and is an unfair or deceptive act or practice.

PAR. 9. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents have been and are now, in substantial competition, in or affecting commerce, with other corporations engaged in the manufacture and sale of toy products.

PAR. 10. The aforesaid acts or practices of respondents, as herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedures prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mego International, Inc. is a corporation, orga-

nized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Madison Square Plaza, New York, New York.

2. Respondent Mego Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and with its office and principal place of business located at 1 Madison Square Plaza, New York, New York.

3. The Federal Trade Commission has jurisdiction of the subject matter in this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

1. The term "children" shall mean persons who appear to be or who are in fact twelve (12) years of age or younger.

2. The term "electrical appliance" shall mean all devices and machines which are run on electricity, but shall not include electrical toys. The term "small electrical appliance" shall mean those electrical appliances which are portable. The term "electrical toys" shall mean all toys and games which are run on electricity. These terms do not include devices, machines, toys or games which are operated only by batteries.

3. Terms in the singular shall include the plural and terms in the plural shall include the singular.

I

It is ordered, That respondents Mego International, Inc., a corporation, and Mego Corporation, a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in or affecting commerce of any product, forthwith cease and desist from directly or indirectly:

A. Representing, through depictions, descriptions or in any other manner, children using, participating in the use of, or present at the time of the use of any electrical hairdryer or other electrical personal grooming appliance, including but not limited to, combs, curlers, brushes and shavers, without the close and watchful supervision of an adult.

B. Representing, through depictions, descriptions or in any other manner, children using, participating in the use of, or present at the time of the use of any electrical toy or small electrical appliance or

toy fascimile thereof in close proximity to any pool or body of water or any other fluid.

C. Representing, through depictions, descriptions, or in any other manner, children using, participating in the use of, or present at the time of use of, any electrical toy or electrical appliance when such representation has the tendency or capacity to influence children to engage in behavior which creates an unreasonable risk of injury to person or property.

It is futher ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions which engage or shall engage in the preparation or dissemination of advertising.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may effect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

WARNER-LAMBERT COMPANY

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8891. Final Order, Dec. 9, 1975 — Modified Order, July 20, 1978

This modified order to cease and desist is issued pursuant to a decision and judgment of the U.S. Court of Appeals for the District of Columbia, 562 F. 2d 749 (1977). The words "(c)ontrary to prior advertising" have been deleted from the disclosure statement required in Part III of the original order to cease and desist issued December 9, 1975, 41 FR 2381, 86 F.T.C. 1398.

MODIFIED ORDER TO CEASE AND DESIST

Respondent, having filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's cease and desist order issued herein on December 9, 1975; and the Court having rendered its decision and judgment on August 2, 1977, affirming and enforcing the Commission's order with modification of Part III; and the Supreme Court of the United States having denied on April 3, 1978, petitions for writs of certiorari filed by the parties:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read as follows:

ORDER

I

It is ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of Listerine or any other non-prescription drug product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product will cure colds or sore throats;

2. Representing, directly or by implication, that any such product will prevent colds or sore throats;

3. Representing, directly or by implication, that users of any such product will have fewer colds than non-users.

II

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale, or distribution of Listerine or any other mouthwash product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product is a treatment for, or will lessen the severity of, colds or sore throats;

2. Representing that any such product will have any significant beneficial effect on the symptoms of sore throats or any beneficial effect on symptoms of colds;

3. Representing that the ability of any such product to kill germs is of medical significance in the treatment of colds or sore throats or the symptoms of colds or sore throats.

III

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisements for the product Listerine Antiseptic unless it is clearly and conspicuously disclosed in each such advertisement in the exact language below that:

> Listerine will not help prevent colds or sore throats or lessen their severity.

In print advertisements, the disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed. In television advertisements, the disclosure shall be presented simultaneously in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur. Each such disclosure shall be presented in the language, *e.g.,* English, Spanish, principally employed in the advertisement.

The aforesaid duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a

sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972.

IV

It is further ordered, That the allegations of Paragraphs Nine and Ten of the complaint be, and they hereby are, dismissed.

V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in its structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of this order, file with the Commission a written report, setting forth in detail the manner and form of its compliance with this order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

AIRCO, INC.

Docket 9098. Interlocutory Order, July 20, 1978

This order grants complaint counsel's motion seeking court enforcement of a subpoena duces tecum issued to a third-party.

ORDER GRANTING COMPLAINT COUNSEL'S MOTION SEEKING COURT ENFORCEMENT OF SUBPOENA DUCES TECUM ISSUED TO AIR PRODUCTS AND CHEMICALS, INC.

The administrative law judge has certified to the Commission, pursuant to Rule 3.38(b), Complaint Counsel's Motion Seeking Court Enforcement of Subpoena Duces Tecum Issued to Air Products and Chemicals, Inc. ("Air Products"), a third party to these proceedings, on September 22, 1977. The specifications as to which there is disagreement are 1(a), (b), 2, 3(b), 3(c), and 7.[1] Air Products contends that these specifications relate to information which is so confidential that it should be made available only to respondent's outside counsel. The administrative law judge, on the other hand, has determined that in addition to outside counsel, Airco's Vice President-Law, Mr. DeWahl, should have access to the information.

The ALJ's position is based on his belief that "a firm facing serious restraint of trade charges was entitled to the assistance of its house counsel familiar with its business and operations, provided he played no role in corporate affairs other than legal counsel." Certification at 3. Moreover, Airco's Vice President-Law has submitted a signed affidavit, at the ALJ's request, which provides that his duties within Airco be limited to the giving of legal advice, and that he not, in any way, participate or make decisions in the operational area. Additionally, Mr. DeWahl would be prohibited from making any notes or copies of the confidential documents.

It is the view of the Commission that the restrictions imposed by the ALJ upon respondent's house counsel represent a reasonable exercise of the law judge's discretion and provide an adequate

[1] 1. Documents sufficient to show:

(a). total net sales for each year from January 1, 1970 to date, in dollars and in units, of each relevant industrial gas sold by your company to distributors;

(b). for each year, those sales included in the response to specification 1(a) that represent sales to company-owned distributors;

2. Documents sufficient to show total net sales for each year from January 1, 1970 to date, in dollars and in units, of medical or therapy oxygen or other medical gases sold by your company.

3. Documents sufficient to show:

(a). facility fees included in the sales figures;

(b). transportation charges not included in the sales figures;

4. Documents sufficient to show all your company's prices in effect for each relevant industrial gas and the calendar period in which such prices were in effect, stated separately, to each distributor.

safeguard against use of this data in connection with the sale or marketing of Airco's products. Although cases cited by Air Products do draw a distinction between disclosure of confidential information to house counsel as opposed to outside counsel, we find those cases inapposite here in view of the restrictions imposed upon the activities of Mr. DeWahl pursuant to his affidavit. Accordingly,

It is ordered, That Complaint Counsel's Motion Seeking Court Enforcement of Subpoena Duces Tecum Issued to Air Products and Chemicals, Inc., be, and the same hereby is, granted.

IN THE MATTER OF

GOLD BULLION INTERNATIONAL, LTD., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND HOBBY PROTECTION ACTS

Docket 9094. Complaint,[1] *Jan. 17, 1977 — Final Order, July 25, 1978*

This order, among other things, requires a Syracuse, N.Y. importer of numismatic items and its corporate officers to cease importing, manufacturing, or distributing any numismatic item that is not plainly and permanently marked "Copy", as required by federal regulations.

Appearances

For the Commission: *Justin Dingfelder* and *Ronald G. Issac.*

For the respondent: *James R. Michal, Jackson, Campbell & Parkinson,* Washington, D.C.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

FEBRUARY 13, 1978

I. SUMMARY OF PROCEEDINGS

On January 17, 1977, the Federal Trade Commission issued a complaint alleging that Gold Bullion International, Ltd. ("Gold Bullion") and its officers H. Kenneth Costello, [2] Walter N. Thompson, and William H. Bogart violated Section 2(b) of the Hobby Protection Act and Section 5 of the Federal Trade Commission Act. The complaint also named as respondents B.H. Mayer's Kunstprageanstalt of Pforzheim, West Germany, a corporation, and Bernhard H. Mayer, an officer of both Gold Bullion and B.H. Mayer's Kunstprageanstalt.

The complaint alleges that respondents, subsequent to November 29, 1973, imported into the United States for distribution in commerce privately minted copies of German 5, 10 and 20 Reichmark gold coins, Mexican 50 Peso gold coins, Austrian 100 Corona gold coins, and other gold coins. The complaint further alleges that the coins are imitation numismatic items as defined in Section 7 of the Hobby Protection Act and that the coins were not marked "copy" as required by Section 2(b) of the Act.

A prehearing conference was held on March 31, 1977 at the

[1] Complaint previously published at 90 F.T.C. 411.

request of Michael Stachowski, counsel for B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer. Complaint counsel and attorneys representing William H. Bogart, Bernhard H. Mayer and B.H. Mayer's Kunstprageanstalt were present and agreed to file answers to the complaint.

On April 8, 1977, respondent William H. Bogart filed his answer admitting certain allegations of the complaint, denying others and averring that the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States preclude the enforcement of the Hobby Protection Act against the respondents.

On April 12, 1977, respondents B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer filed their answer, generally denying the allegations of the complaint and averring that the Federal Trade Commission lacks both personal and subject matter jurisdiction.

On April 21, 1977, respondents Gold Bullion, H. Kenneth Costello and Walter N. Thompson filed their answers admitting certain allegations of the complaint, denying others and averring that the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States preclude the enforcement of the Hobby Protection Act against them. [3]

On April 28, 1977, complaint counsel served on respondent Gold Bullion a request for admissions of fact to which respondent replied on May 10, 1977.

On May 11, 1977, complaint counsel and counsel for respondents B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer moved to withdraw this matter from litigation with respect to these respondents for the purpose of considering an executed proposed consent agreement. On June 1, 1977, I certified the executed agreement to the Commission, which, on August 9, 1977, voted to accept the modified consent agreement and decision and order as to B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer. The Commission issued its final decision and order as to these respondents on November 1, 1977.

On June 20, 1977, a subpoena *duces tecum* was served on Gold Bullion for the production of documents relating to its activities with B.H. Mayer's Kunstprageanstalt. In response to my order of July 5, 1977, counsel for Gold Bullion delivered the subpoenaed documents to complaint counsel on August 1, 1977.

A prehearing conference was held on June 23, 1977 to discuss the dates by which lists of potential witnesses and exhibits should be submitted and the date and place of evidentiary hearings. The general round of hearings was set for October 17, 1977 thru October

28, 1977, with a special hearing to be held in August to take the testimony of complaint counsel's witness Bernhard H. Mayer.

On August 22, 1977, the Commission was served with a subpoena *duces tecum* on behalf of respondents for documents relating to Gold Bullion. Complaint counsel responded to the subpoena on August 24, 1977. At the same time complaint counsel filed a request for admissions of genuineness of documents; respondents' counsel did not respond and thereby admitted the request.

Complaint counsel furnished their lists of witnesses and documentary exhibits to respondents' counsel on August 29, 1977. A supplemental list was provided on October 14, 1977. Respondents' counsel provided complaint counsel with their description of witnesses and documentary exhibits on September 30, 1977. Two supplemental lists were received from respondents' counsel on October 5, 1977 and October 14, 1977, respectively. [4]

Hearings were held in complaint counsel's case-in-chief on August 30, 1977 and from October 17 to October 18, 1977. Respondents' hearings in defense were held from October 18 to October 19, 1977. All hearings in the case were held in Washington, D.C. The record was closed on November 1, 1977.

Complaint counsel and respondents filed their proposed findings of fact and conclusions of law on December 1, 1977 and their replies ten days later. The following findings of fact, conclusions of law and order are based upon the record in this case and the proposed findings filed by complaint counsel and respondents. Proposed findings not adopted herein verbatim or in substance are rejected as not supported by the evidence or as immaterial.

II. Findings of Fact[1]

A. DESCRIPTION OF THE CORPORATE RESPONDENT

1. Respondent Gold Bullion International, Ltd. is a corporation organized and existing under and by virtue of the laws of the State of New York (Gold Bullion Ans., ¶1), with its principal office and place of business formerly located at Suite 216-A, State Tower Building, Syracuse, New York (CX 45e(4)).

2. Gold Bullion was created and existed for the purpose of importing, selling and distributing gold bullion coins and gold bullion products to coin dealers for resale and to consumers (Tr. 17, 541).

3. Gold Bullion actually engaged in the business of importing,

[1] Abbreviations used in this decision are: Tr. – Transcript of testimony. CX – Commission exhibits. RX – Respondents' exhibits. Ans. – Answer. Adm. – Answers to complaint counsel's requests for admissions.

selling and distributing gold bullion coins from October 1974, when the corporation was formed, until [5] February 1975, when it ceased active business operations after several shipments of coins had been seized by U.S. Customs (Tr. 16, 35, 455–59, 504).

4. Gold Bullion is still in existence for purposes of a pending civil libel action (Tr. 457, 475–76).

B. DESCRIPTION OF THE INDIVIDUAL RESPONDENTS

5. Respondent H. Kenneth Costello has been president of Gold Bullion since its inception (Tr. 489). He took part in the formation of the corporation, contributed $5000 towards the intial capitalization, in exchange for which he received an initial 27 percent ownership interest (subsequently reduced), and agreed to serve as president at a salary which was never drawn (Tr. 488–90, 574–75).

6. Respondent Walter N. Thompson has been the vice-president and treasurer of Gold Bullion since its inception (Tr. 434, 462). He took part in the formation of the corporation, contributed $5000 towards the capitalization, in exchange for which he received a 15 percent ownership interest, and agreed to serve in the above-mentioned capacities (Tr. 434).

7. Respondent William H. Bogart has been secretary of and legal counsel to Gold Bullion since its inception (Tr. 542-43). He took part in the formation of the corporation, contributed $5000 towards the initial capitalization, in exchange for which he received an initial 33 percent ownership interest (subsequently reduced), and agreed to serve in the above-mentioned capacities (Tr. 541–44, 574–75).

8. Bernhard H. Mayer owns and operates B.H. Mayer's Kunstprageanstalt, a family owned mint located in Pforzheim, West Germany, which manufactures coins, medals, and other metallic pieces (Tr. 14).

9. Mr. Mayer has been the major shareholder in Gold Bullion since its inception (Tr. 16). He has also been a director and officer of this respondent since its inception (Tr. 17). [6]

10. The impetus for the formation of Gold Bullion came from Messrs. Bogart and Mayer who discussed business opportunities growing out of the legalization of gold ownership in the United States (Tr. 71–75, 539–41, 569–70). Mr. Bogart recommended Messrs. Costello and Thompson to Mr. Mayer as persons potentially interested in the marketing of gold bullion items (Tr. 542).

11. Messrs. Bogart, Costello, Thompson, and Mayer were the persons responsible for the ownership and operation of Gold Bullion (Tr. 17). There were no other officers besides these four men (Tr. 576).

12. Gold Bullion had only two employees besides its officers–a secretary and a Mr. Carroll. Mr. Carroll was employed by Gold Bullion for only a month or less (Tr. 571).

13. Although Messrs. Costello and Thompson placed orders with B.H. Mayer Kunstprageanstalt for particular gold bullion coins (Tr. 573), Mr. Mayer made the decisions as to the types of coins that Gold Bullion imported, sold and distributed into the United States and did the research regarding whether particular coins were or were not legal tender under German laws and, thus, able to be reproduced (Tr. 80–82, 437–38, 470–71, 491, 496, 502, 544, 550).

14. As legal counsel for Gold Bullion, Mr. Bogart was responsible for determining the legality of marketing gold bullion coins in the United States (Tr. 545–47). He did not actively participate in the daily business operations of Gold Bullion (Tr. 544).

15. Messrs. Costello and Thompson were responsible for the daily operation and management of Gold Bullion (Tr. 437, 572–73). At times, Mr. Thompson personally sold coins to private parties (Tr. 463).

16. After Gold Bullion ceased doing business, Mr. Mayer and the individual respondents formed B.H. Mayer's of America, an American corporation which markets numismatic items such as silver bars and commemorative medals produced by B.H. Mayer's Kunstprageanstalt (Tr. 58, 460–61). There is no evidence, however, that it markets the kinds of coins which are at issue in this case. [7]

17. Mr. Costello is presently employed as a licensed stockbroker (Tr. 487–88). He has not had any involvement with B.H. Mayer's of America (Tr. 507) and he does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 505–06).

18. Mr. Thompson is presently employed as a licensed securities dealer (Tr. 435). He was associated with B.H. Mayer's of America from the time Gold Bullion ceased active operation until October 1976 (Tr. 460–61). He does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 458–59).

19. Mr. Bogart is presently employed as a private attorney (Tr. 538). He served as president of B.H. Mayer's of America from late fall 1975 until summer 1976 and remained on as legal counsel and as secretary until fall 1977 (Tr. 563–64). He does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 566).

C. THE MANUFACTURE AND IMPORTATION OF THE GOLD COIN REPRODUCTIONS

(1) *The Nature of Respondents' Business*

20. The gold coins sold and distributed by Gold Bullion were manufactured by B.H. Mayer's Kunstprageanstalt (Gold Bullion Adm., ¶4; Tr. 24).

21. B.H. Mayer's Kunstprageanstalt did not manufacture and ship coins to Gold Bullion unless they were ordered by Gold Bullion, and invoices were made out only for coins that were actually shipped (Tr. 39, 42).

22. The coins that B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion in the United States were shipped for the account of Gold Bullion International, Ltd., Suite 216-A, State Tower Building, Syracuse, New York (CXs 67a, 68a). Gold Bullion was the actual owner of these coins for Customs purposes (Tr. 342).

23. The gold coins were purchased from B.H. Mayer's Kunstprageanstalt from October 1974 to January 1975 and shipped from West Germany to the United States for sale and distribution in the United States (Gold Bullion Adm., ¶¶2 and 6). [8]

24. The coins that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were not manufactured for any government (Tr. 28, 33-34).

25. The coins that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were not original coins but so-called "restrikes"[2] (Tr. 33).

26. The original coins which B.H. Mayer's Kunstprageanstalt copied for Gold Bullion were German 5 Mark, 10 Mark, and 20 Mark gold coins, Austrian 100 Corona, 1 Ducat, and 4 Ducat gold coins, a French 10 Franc gold coin and a Mexican 50 Peso gold coin (Tr. 23-24; CXs 6, 16, 18, 19, 45e(1)-(4), 48d, 49e, 67a-c, 68a-c).

27. None of the coins that Gold Bullion ordered from B.H. Mayer's Kunstprageanstalt and imported into the United States were marked "copy" (Gold Bullion Adm., ¶8; Tr. 38, 43, 49).

28. On January 7, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion a package of gold coin restrikes consisting of one 100 Corona, five 10 Francs, six 50 Pesos, and twenty-nine 5 Reichmarks (Tr. 57; CXs 6, 49(c)). The coins were not marked "copy" (Tr. 47). On February 5, 1975, the shipment of coins was seized by the United States Customs Service for alleged violation of the Hobby Protection Act in that they were not marked "copy" (Tr. 323-27; CX 49(b)-(e)).

[2] This term is used sometimes herein to refer to Gold Bullion's copies of original coins, although the numismatic community gives a narrower definition to that term. See Finding 72, *infra*.

29. On January 29, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion a package containing in part ninety 5 Reichmarks and one hundred ten 10 Franc gold coin restrikes (Tr. 37–38; CX 18). On January 30, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion 97 copies of the 50 Peso gold coin (Tr. 41; CX 19). The coins were not marked "copy" (Tr. 38). On February 18, 1975, U.S. Customs seized the January 29 and January 30 shipments for suspected violation of the Hobby Protection Act in that the coins were not marked "copy" (CX 48a–d). [9]

(2) *The Date of Manufacture of the Coins*

30. B.H. Mayer's Kunstprageanstalt does not maintain records that would disclose the date of manufacture of the coins shipped to Gold Bullion (Tr. 49, 97, 122–23). However, Mr. Mayer testified that some of the coins shipped to Gold Bullion were manufactured after November 29, 1973 (Tr. 49).[3] The difficulty is in determining precisely when each type of coin was manufactured.

31. In order to mint coins you first have to have a die for each type of coin that is to be minted (Tr. 18).

32. The only original dies that B.H. Mayer's Kunstprageanstalt possessed were the dies for the 5, 10, and 20 Reichmarks (Tr. 19, 76). The dies used to manufacture the 1 Ducat and the 10 Franc were made later on, although before the existence of Gold Bullion (Tr. 76–77, 90). The dies used to manufacture the 100 Corona, the 4 Ducat, and the 50 Peso were made especially for Gold Bullion (Tr. 77–78, 89–90, 98, 122).

33. All of the 50 Pesos and 100 Coronas that B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion were manufactured by B.H. Mayer's Kunstprageanstalt (Tr. 98).

34. Since all of the 50 Pesos, the 4 Ducats, and the 100 Coronas were minted by B.H. Mayer's Kunstprageanstalt from dies made after Gold Bullion was formed (October 1974), they had to have been manufactured after November 29, 1973.

35. The only coins that B.H. Mayer's Kunstprageanstalt had in stock at the time Gold Bullion began doing business were the 5, 10, and 20 Reichmarks, the 1 Ducat, and the 10 Franc (Tr. 96–97, 123). The number of these coins that B.H. Mayer's Kunstprageanstalt had in stock at the time it began shipping to Gold Bullion was very small and did not last more than one or two weeks. Mr. Mayer concluded that his company did not have enough of these coins in stock [10] to

[3] The date when the Hobby Protection Act was enacted. Section 8 of the Act states:

This Act shall apply only to imitation political items and imitation numismatic items manufactured after the date of enactment of this Act.

account for all the coins that were shipped to Gold Bullion (Tr. 135–36). In light of the small stock of these coins which existed in October of 1974, I conclude that at least some of these coins were manufactured and shipped to Gold Bullion after November 29, 1973.

36. On January 16, 1975, a shipment of gold was delivered to B.H. Mayer's Kunstprageanstalt from Degussa [the processor of the gold sheets from which the coins were manufactured] (Tr. 54–56, 100–01). The date of the shipment was the same as that on the invoice (Tr. 101; CX 55). The invoice indicates that the gold was to be used for the manufacture of coins for Gold Bullion (CX 55). The gold could only have been used to manufacture either 1 or 4 Ducat coins (Tr. 56). Inasmuch as the Degussa firm is located in Pforzheim, West Germany (Tr. 50), it takes only five minutes for the gold to get from Degussa to B.H. Mayer's Kunstprageanstalt (Tr. 100).

37. It normally took between one day and one week for gold received from Degussa to be minted into coins and shipped to Gold Bullion (Tr. 110, 135). About one hundred fifty 1 Ducats were struck from the gold received from Degussa on January 16, 1975 (Tr. 101–02), and on January 21, 1975, ninety-five 1 Ducats were shipped to Gold Bullion (CXs 68b, 68c)—five days later.

38. Because the gold was used only for the production of 1 or 4 Ducat coins and because 1 Ducat coins were actually manufactured and shipped to Gold Bullion shortly after receipt of the gold from Degussa, I find that some 1 Ducats were manufactured after November 29, 1973 and shipped to Gold Bullion.

(3) *The Use of the Original Gold Coins in Exchange*

39. The copies of the German 5 Mark that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1877 with the image of Wilhelm I on their face and were marked with an "A" mint mark (CXs 46a, 47b). An "A" mark indicates the Berlin Mint (Tr. 244).

40. The German Government's Berlin Mint issued a 5 Mark gold coin in 1877 (Tr. 233–34). The coin was minted with the image of Wilhelm I on its face (Tr. 234). [11]

41. B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion two different types of German 10 Mark gold coin copies. One type was dated 1888, Berlin mint mark, with the image of Wilhelm II (CXs 46b, 45e(2)); the other type was dated 1887, Berlin mint mark, with the image of Wilhelm I (Tr. 384–85; CX 71c–d).

42. The Berlin Mint did not issue a 10 Mark gold coin in 1888 with the image of Wilhelm II but it did issue a 10 Mark gold coin in 1889 with the image of Wilhelm II (Tr. 244–45; RX 43n).

43. The 1888 Wilhelm II 10 Mark gold coin manufactured by B.H. Mayer's Kunstprageanstalt and shipped to Gold Bullion differs from the 1889 Wilhelm II 10 Mark gold coin issued by the Berlin Mint with respect to the date (Tr. 305; CX 46b; RX 43n).

44. The Berlin Mint did not issue a 10 Mark gold coin in 1887 with the image of Wilhelm I, but it did issue a 10 Mark gold coin in 1888 with the image of Wilhelm I (Tr. 249; RX 43n).

45. The 1887 Wilhelm I 10 Mark gold coin manufactured by B.H. Mayer's Kunstprageanstalt and shipped to Gold Bullion differs from the 1888 Wilhelm I 10 Mark gold coin issued by the Berlin Mint with respect to the date (CX 71c–d; RX 43n).

46. Since the dates imprinted on them are different than the dates on the original coins, the two Gold Bullion 10 Mark gold coins are not copies of 10 Mark gold coins actually issued by the German government and used in exchange. Furthermore, there is no reliable evidence in the record that suggests that consumers would confuse the Gold Bullion 10 Mark coins with the originals.

47. B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion two different types of German 20 Mark gold coin copies. One type was dated 1887, Berlin mint mark, with the image of Wilhelm II (CXs 46c, 45e(2)); the other type was dated 1887, Berlin mint mark, with the image of Wilhelm I (Tr. 384–85; CX 71a–b).

48. The Berlin Mint did not issue a 20 Mark gold coin in 1887 with the image of Wilhelm II, but it did issue 20 Mark gold coins in 1888 and 1889 with the image of Wilhelm II (Tr. 245; RX 43n). [12]

49. The 1887 Wilhelm II 20 Mark gold coin manufactured by B.H. Mayer's Kunstprageanstalt and shipped to Gold Bullion differs from the 1888 and 1889 Wilhelm II 20 Mark gold coins issued by the Berlin Mint with respect to the date (Tr. 306; CX 46c; RX 43n).

50. The Berlin Mint issued a 20 Mark gold coin in 1887 with the image of Wilhelm I and the Gold Bullion 20 Mark 1887 Wilhelm I is a copy of the original (Tr. 248, 251, RX 43n).

51. However, the Gold Bullion 20 Mark gold coin bearing the portrait of Wilhelm II and dated 1887 is not a copy of the 20 Mark gold coins actually issued by the German Government and used in exchange. Aside from speculation by complaint counsel's expert witness (Tr. 312–13), there is no evidence that suggests that consumers would confuse the Gold Bullion coin with the original.

52. The copies of the Austrian 100 Corona that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1915 (CX 45e(2)).

53. The Austrian Government issued 100 Corona gold coins in 1915 (Tr. 34, 224).

54. The copies of the Austrian 1 Ducat and 4 Ducat that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1915 (CX 45e(3)).

55. The Austrian Government issued 1 Ducat and 4 Ducat gold coins in 1915 (Tr. 34, 224).

56. Mr. Harvey Stack, a partner in Stack's, America's largest and oldest coin dealer (Tr. 202), testified for complaint counsel as an expert numismatist. On direct examination, he testified that the German 5, 10 and 20 Mark and the Austrian 1 and 4 Ducat and 100 Corona coins were used in exchange or were intended to be used in exchange (Tr. 224–27, 241–42, 248–50).

57. However, on cross-examination, Mr. Stack conceded that he was not certain about the use of 100 Corona coins: [13]

Q. . . .Do you have any information or knowledge, sir, from your years of experience as a numismatist that the 1915 100 corona was ever used in exchange?
A. I really can't say.
Q. You don't know.
A. I don't know because I wouldn't want to make a false statement.
Q. That is all I am asking. You don't know?
A. I don't know. (Tr. 284–85).

58. Cross-examination also revealed Mr. Stack's uncertainty about whether the 1915 1 and 4 Ducats were actually used in exchange (Tr. 287–88, 320–21), and I find that complaint counsel have not proved that the 100 Corona and 1 and 4 Ducat coins were used in exchange.

59. According to Mr. Stack, "the original issue" 5, 10 and 20 Mark gold coins were used in exchange by the German Government (Tr. 248).

60. The copies of the French 10 Franc that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1862 (CXs 47c, 45e(3)).

61. The French Government did issue a 10 Franc gold coin in 1862 (Tr. 204; CX 61).

62. The 10 Franc issued by the French Government in 1862 was used in exchange (Tr. 33, 207).

63. The copies of the Mexican 50 Pesos that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1821–1947 (CXs 47a, 45e(3)).

64. The Mexican Government did issue a 50 Peso coin in 1947 marked 1821–1947. The date 1821 stands for the year Mexico obtained its independence. The date 1947 was the year the coin was issued (Tr. 215–16; RX 21g). [14]

65. The Mexican 50 Peso gold coin issued in 1947 can be exchanged at a bank for other currency or traded in a store for goods

or services. The exchange value is based upon the daily gold rate. Therefore, the Mexican 50 Peso gold coin is used in exchange (Tr. 218, 298–300, 532–35).

66. In conclusion, I find that B.H. Mayer's Kunstprageanstalt manufactured the following coins after November 29, 1973, and that these coins are copies of government originals or restrikes which were used in exchange:

German 5 Mark
German 20 Mark 1887 Wilhelm I
French 10 Franc
Mexican 50 Peso

67. The other coins manufactured by B.H. Mayer's Kunstprageanstalt do not come within the provisions of the Hobby Protection Act either because there was no original coin issued by a government (the Gold Bullion 10 Mark Wilhelm II 1887, 10 Mark Wilhelm II 1888 and 20 Mark Wilhelm II 1887) or because there is no evidence that the original coins were used in exchange (Austrian 1 and 4 Ducat and 100 Corona).

D. THE POSSIBILITY OF CONSUMER DECEPTION

68. The gold coin copies imported and distributed by Gold Bullion were sold and marketed for their gold value and not for their numismatic value (Tr. 87, 91, 137, 141, 440, 492, 495, 551). The selling price of these coins was predicated upon the daily closing price of gold on the London exchange as of the order date plus a small percentage markup (Tr. 440, 492). Stack's, a reputable coin dealer, sells government restrikes on the same basis (Tr. 231–32).

69. The coins sold by Gold Bullion had "fineness" markings on them. A fineness marking indicates gold content. Fineness markings do not ordinarily appear on original coins (Tr. 21, 253–56).

70. Since fineness markings are small, there is a possibility that such markings could go unnoticed by consumers (Tr. 256–57). [15]

71. Gold Bullion represented only that the coins it imported and sold were restrikes. There were no direct representations made that the coins were original coins. Gold Bullion's advertising mentioned B.H. Mayer's Kunstprageanstalt as the source of the coins, although it did not expressly state who manufactured the coins (Tr. 442–44; CX 45e(4)).

72. A restrike, as the term is used by the numismatic community, is a coin struck by a duly authorized government, generally within its own mint, using original dies or copies of dies which had once been used to strike coins of a design originally used in circulation or previously approved for issuance. The coins that Gold Bullion

imported and sold were not "restrikes" as the term is used by the numismatic community (Tr. 221, 239–40, 258–59; CX 66e).

73. While official government gold restrikes of coins are sold only on the basis of their gold value (Tr. 228, 237–38), such restrikes are still considered numismatic items. A numismatic item has no special connotation in the numismatic community; it is a monetary unit and, as such, it is part of numismatic history (Tr. 228–29, 311). Even though it is "official," a government restrike may have no more value than a private one.[4]

74. There is a possibility that coin collectors might mistakenly believe that Gold Bullion's coins were official restrikes or, even, original coins (Tr. 211, 222, 234–35). However, a coin collector could also be misled into believing that a government restrike was an original coin (Tr. 261–62).

75. Restrikes of gold coins—whether by a private mint or by a government mint—are not sold for their numismatic value but for their gold content. Reputable dealers make no claim that government restrikes have [16] some value beyond their gold content,[5] and Gold Bullion has made no such claim.

76. It is, therefore, unlikely that the average purchaser of restrikes is collecting them for any purpose other than their gold content. If that is so—and complaint counsel have presented no reliable contrary evidence—then the average consumer does not believe that the Gold Bullion restrikes have a value in excess of their gold content.

77. Of course, as I note above, it is possible that some coin collectors might believe that the Gold Bullion coins are original numismatic items with a value exceeding their gold content. However, this is simply a guess, for complaint counsel have not presented any consumer testimony which would resolve this question.[6] Therefore, I find that complaint counsel have not established that the appearance of Gold Bullion's coins would probably deceive coin collectors into believing that they have purchased original numismatic items. [17]

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[4] For example, an original Austrian 100 Corona coin is worth between $750 and $1000. The government restrikes sell only at the gold exchange rate, as does the Gold Bullion restrike (Tr. 228–29).

[5] Q. Mr. Stack, wait a minute. Why do you sell these restrikes? Do you tell the people who buy them that they are buying a restrike because it is a valuable coin to be collected because it may go up in value in the future? Or are you telling them it is a convenient way to buy gold, as far as you are concerned?

A. The Witness: As far as I am concerned, it is a convenient way of buying gold and trading gold coins. (Tr. 272).

[6] Mr. Stack stated that the similarity in design between an original coin and a Gold Bullion restrike would lead a consumer into believing that he is buying a genuine coin (Tr. 222). While his testimony is entitled to some weight, it is not sufficient, I believe, in this case of first impression to warrant a finding that Gold Bullion's coins have deceived or might deceive the average coin collector, who, if there were any doubt about the genuineness of a coin, could seek the advice of a coin dealer (Tr. 222–23).

III. Conclusions of Law

A. THE HOBBY PROTECTION ACT

Section 4(a) of the Hobby Protection Act (Pub. Law 93-167, 87 Stat. 686, 15 U.S.C. 2101, *et seq.*) provides that the Act shall be enforced by the Federal Trade Commission under the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C. 41, *et seq.*). Section 4(b) of the Hobby Protection Act gives the Commission the power to prevent any person from violating the provisions of the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of the Hobby Protection Act.

Section 7(3) of the Hobby Protection Act defines "original numismatic item" as "anything which has been a part of a coinage or issue which has been used in exchange or has been used to commemorate a person or event. Such term includes coins, tokens, paper money, and commemorative medals."

Section 7(4) defines "imitation numismatic item" as "an item which purports to be, but in fact is not, an original numismatic item or which is a reproduction, copy, or counterfeit of an original numismatic item."

Section 8 provides that the Act shall apply only to imitation political items and imitation numismatic items manufactured after the date of enactment of the Act. The Act took effect on November 29, 1973.

The importation into the United States, for introduction into or distribution in commerce of any imitation numismatic item which is not marked "copy" violates Section 2(b) of the Hobby Protection Act and the Federal Trade Commission Act. There is no requirement that knowledge or intent to deceive be shown in order to prove that the Hobby Protection Act has been violated.

B. CERTAIN GOLD BULLION COINS ARE COPIES OF ORIGINAL NUMISMATIC ITEMS

Whether they are original issues or government restrikes, the German 5 Mark and 20 Mark 1887 Wilhelm I, [18] the French 10 Franc and the Mexican 50 Peso are "original numismatic items" under the Hobby Protection Act. Respondents argue, however, that because the corresponding Gold Bullion coins are stamped with a "fineness" mark, this distinguishes them from the original coins.

The average coin collector might well be aware of the distinction

between original coins or government restrikes and coins bearing a "fineness" mark and the persons who collect gold coins strictly for their gold content might not care whether they are issued by a government or a private mint.

However, Congress considered these possibilities and concluded (1) that collectors of gold coins are concerned about the origin of those coins and (2) that fineness markings do not adequately distinguish original numismatic items from copies. Concerned about potential deception in the marketing of coin reproductions, Congress explored the use of other terms besides the word "copy." The word "copy" was apparently agreed upon because it is short, compact, and easily understood by everyone. *See, Bills to Protect Certain Hobbyists and Collectors of Antique Glassware and China: Hearings on H.R. 4678, H.R. 1068, H.R. 3448, H.R. 3747, and H.R. 4551 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 93d Cong., 1st Sess. 34, 44–45 (1973). No substitutions for the word "copy" can be made without violating the Hobby Protection Act, for Congress has made it clear that this is the best way to guard against the possibility, however slight, of deception.[7]

While the record indicates that respondents' literature and its disclosures to customers should inform them that the coins they are buying are neither original coins nor restrikes issued by a government and while I find it impossible to infer, from this record, that any of Gold [19] Bullion's customers were deceived into beleiving that they were purchasing original numismatic items,[8] there is still the possibility that these coins could be represented and resold as originals by unscrupulous persons.

In any event, Congress has concluded that copies of original numismatic items which are not marked as such are inherently deceptive, and my conclusion that this record fails clearly to show deception is unimportant, for that is not a necessary element of proof under the Hobby Protection Act.

C. MEANING OF THE TERM "USED IN EXCHANGE"

Respondents argue that certain coins, such as the 1947 Mexican 50

[7] Complaint counsel also argue that the 10 Mark Wilhelm I 1887, 10 Mark Wilhelm II 1888 and the 20 Mark Wilhelm II 1887 coins are copies of original numismatic items. I disagree. The difference in date between the original coins and the Gold Bullion coins so distinguishes them that I do not believe the latter are copies of the former.

[8] Of course, proof of actual deception is not necessary in Section 5 cases. Only capacity to deceive need be shown and this may be inferred despite the lack of consumer testimony. However, this is a case of first impression and there is no backlog of experience upon which I can rely to infer deception, nor were there any statements made by respondents which contain such deceptive potential that consumer testimony would be superfluous. See *Leonard F. Porter, Inc., et al.*, 88 F.T.C. 546, 625 (1976).

Peso, were not "used in exchange" within the meaning of the Act because their exchange rate was tied to the daily price of gold rather than to the face value of the coin. Complaint counsel counter this argument by arguing that whether a coin is traded in a grocery store for a loaf of bread or taken to a bank to be exchanged for currency, it is still *"used in exchange"* if one can demand compensation for it in the form of goods or services. The use of certain of the coins, such as the Mexican 50 Peso, on a barter basis confirms that the coins were used in the normal flow of commerce. If a coin that is actively traded in the marketplace and is used as a means of payment is not considered to be "used in exchange," then that term would take on a highly technical and artificial meaning other than that which was intended. For instance, during hearings on the Hobby Protection legislation, there was testimony that silver ingots were once "circulated as [20] money or exchange" during the silver-rush days of the Old American West. Congressman Bob Eckhardt of Texas, presiding at the hearings, agreed that the ingots were "used in exchange" and I believe that this broad interpretation of the phrase should apply when deciding whether coins were "original numismatic items."

D. THE ARGUMENT THAT GOVERNMENT RESTRIKES ARE NOT "ORIGINAL NUMISMATIC ITEMS"

Respondents assert that government restrikes are issued, not for purposes of being used in exchange, but to sell gold at the best possible price. Therefore, they claim, Gold Bullion copies of such restrikes do not violate the Hobby Protection Act since the restrikes were not issued as part of the country's coinage and are not "original numismatic items."

The evidence in this record reveals that certain coins—whether original issues or restrikes—were, regardless of the intent of the government when they were issued, used in exchange. This satisfies the requirements of the Hobby Protection Act.

E. LIABILITY OF THE INDIVIDUAL AND CORPORATE RESPONDENTS

It is well settled that to promote the full effectiveness of its orders and to prevent those orders from being evaded, the Commission has the authority to name the officers, directors, and stockholders of a corporation as respondents in their individual capacities when they have played a significant role in the acts or practices giving rise to the complaint, *FTC* v. *Standard Education Society,* 302 U.S. 112, 119–20 (1937); *Rayex Corp.* v. *FTC,* 317 F.2d 290, 295 (2d Cir. 1963).

Despite respondents' argument to the contrary, it is clear that the individuals named in the complaint controlled the acts and practices of the corporate respondent or had the ability to exercise control by virtue of their ownership of the corporate respondent. It is also undisputed that an order against the individuals who controlled the activities of a defunct corporation may be appropriate, *Pati-Port, Inc.* v. *FTC*, 313 F.2d 103, 105 (4th Cir. 1963). [21]

Nevertheless, the basic purpose of an order directed to individual respondents is to "prevent recurrence of the particular violations for which named individuals have been responsible." *Peacock Buick, Inc.*, 86 F.T.C. 1532, 1565 (1975). If the individuals were not responsible for the violations, then there is little likelihood of recurrence of those violations.

The individual respondents were, in one sense, "responsible" for the violations revealed in this record, for they did import and resell copies of original numismatic items without marking them as such; however, in a more important sense, they were not "responsible," for this record does not reveal any instance of actual deception of customers by these respondents, any intent to deceive their customers or any knowledge, prior to the seizure of their coins by U.S. Customs, that they were violating the Hobby Protection Act.

The absence of proof of conscious, purposeful violations of the law coupled with testimony that all three respondents are gainfully employed in fields totally unrelated to the marketing of gold coins and have no intention to become involved in a business similar to Gold Bullion distinguish this case from those where the individual respondents were either still engaging or were likely to engage in the same unlawful behavior with the same or another company. *See, e.g., FTC* v. *Standard Education Society, supra; Dlutz* v. *FTC*, 406 F.2d 227 (3d Cir.), *cert. denied*, 395 U.S. 936 (1969), *reh. denied*, 396 U.S. 869 (1969); *Coro, Inc.* v. *FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *United States* v. *Bestline Products Corp.*, 412 F. Supp. 754 (N.D. Calif. 1976).

If the record revealed that respondents had acted in bad faith or were likely to again violate the same law, then they would be held accountable.

The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. [22] *Eugene Dietzgen Co.* v. *FTC*, 142 F.2d 321 (7th Cir. 1944), *cert. denied*, 323 U.S. 730 (1945). I conclude that it is unnecessary to enter an order against the respondents in their individual capacities.

Respondents claim that issuance of a cease and desist order would be improper because they discontinued their business activities approximately two years prior to issuance of the Commission's complaint. However, discontinuance of acts which are subsequently found to be illegal has been held not to bar the issuance of a cease and desist order, *Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1403 (2d Cir. 1976), *cert. denied,* 429 U.S. 818 (1976); *Libby-Owens-Ford Glass Co.* v. *FTC,* 352 F.2d 415, 418 (D.C. Cir. 1974); *Diener's Inc.* v. *FTC,* 494 F.2d 1132, 1133 (D.C. Cir. 1974); *Eugene Dietzgen Co.* v. *FTC, supra* at 330; *Galter* v. *FTC,* 186 F.2d 810 (7th Cir.), *cert. denied,* 342 U.S. 818 (1951); *Fairyfoot Products* v. *FTC,* 80 F.2d 684, 686 (7th Cir. 1935), especially where, as here, discontinuance was not voluntary but was prompted by the U.S. Customs' seizure of their coins. *Coro, Inc.* v. *FTC, supra* at 153.

Respondents argue that if an order is entered, it should not include a provision that a notice be sent to each purchaser of a gold bullion coin purchased from respondent because there is no record evidence of actual consumer deception. That is correct, yet Congress has determined that copies, not so marked, of original numismatic items are deceptive;[9] therefore, an order provision which alerts consumers that coins which they purchased from Gold Bullion are not original numismatic items is proper. Of course the notice provision shall apply only to those coins which I have found should have been marked as copies.

F. SUMMARY

1. The Commission has jurisdiction over the acts and practices of respondents. [23]

2. Respondents imported into the United States, for sale and distribution in commerce, copies of gold coins which were manufactured after November 29, 1973, the effective date of the Hobby Protection Act.

3. The German 5 Mark and 20 Mark Wilhelm I 1887, the French 10 Franc and the Mexican 50 Peso gold coins imported by respondents into the United States for sale and distribution in commerce are copies of original coins or restrikes which were used in exchange. Section 7(2) of the Hobby Protection Act, 15 U.S.C. 2106(2).

4. The German 5 Mark and 20 Mark Wilhelm I 1887, the French 10 Franc and the Mexican 50 Peso gold coins imported by

[9] Section 2(b) of the Act states: "The manufacture. . . or the importation. . .of any imitation numismatic item which is not plainly and permanently marked 'copy' is unlawful and is an unfair or deceptive act or practice. . . ."

respondents are imitation numismatic items. Section 7(4) of the Hobby Protection Act, 15 U.S.C. 2106(4).

5. The German 5 Mark and 20 Mark Wilhelm I 1887, the French 10 Franc and the Mexican 50 Peso gold coins imported by respondents were not marked copy. Section 2(b) of the Hobby Protection Act, 15 U.S.C. 2101(b).

6. None of the other coins imported by respondents come within the provisions of the Hobby Protection Act.

7. The public interest requires that an order be entered against Gold Bullion International, Ltd., but not against the individually named respondents. The following order is therefore entered.

ORDER

It is ordered, that respondent Gold Bullion International, Ltd., a corporation, its successors and assigns, its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation or distribution in or affecting commerce (as [24] defined in Section 4 of the Federal Trade Commission Act; 15 U.S.C. 44) of any imitation numismatic items, as "imitation numismatic item" is defined in the Hobby Protection Act (Pub. Law 93-167, 15 U.S.C. 2101, *et seq.*), do forthwith cease and desist from:

Importing, manufacturing or distributing any imitation numismatic item that is not plainly and permanently marked "COPY" as required by Section 2(b) of the Hobby Protection Act and the regulations promulgated thereunder. The word "COPY" shall appear in conformance with 16 C.F.R. 304.6, *i.e.,* in capital letters, in the English language, incused in sans-serif letters having a vertical dimension of not less than two millimeters (2.0mm) and a minimum depth of three-tenths of one millimeter (0.3mm) or one-half (1/2) the thickness of the reproduction, whichever is the lesser. The minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0mm).

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, and to each purchaser of its German 5 Mark and 20 Mark Wilhelm I 1887, French 10 Franc and [25] Mexican 50 Peso coins. Each purchaser of the above-listed coins shall also be advised in writing on Gold Bullion International, Ltd., stationery that the coins they have purchased are not original numismatic items and that a private right of action for damages under Section 3 of the Hobby Protection Act exists.

It is further ordered, That respondent notify the Commission at

Respondents claim that issuance of a cease and desist order would be improper because they discontinued their business activities approximately two years prior to issuance of the Commission's complaint. However, discontinuance of acts which are subsequently found to be illegal has been held not to bar the issuance of a cease and desist order, *Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1403 (2d Cir. 1976), *cert. denied,* 429 U.S. 818 (1976); *Libby-Owens-Ford Glass Co.* v. *FTC,* 352 F.2d 415, 418 (D.C. Cir. 1974); *Diener's Inc.* v. *FTC,* 494 F.2d 1132, 1133 (D.C. Cir. 1974); *Eugene Dietzgen Co.* v. *FTC, supra* at 330; *Galter* v. *FTC,* 186 F.2d 810 (7th Cir.), *cert. denied,* 342 U.S. 818 (1951); *Fairyfoot Products* v. *FTC,* 80 F.2d 684, 686 (7th Cir. 1935), especially where, as here, discontinuance was not voluntary but was prompted by the U.S. Customs' seizure of their coins. *Coro, Inc.* v. *FTC, supra* at 153.

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It is further ordered, That respondent notify the Commission at

least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

This is the first case to be tried under the Hobby Protection Act, 15 U.S.C. 2101, *et seq.* (1974), which requires, *inter alia,* that imported or domestic "imitation numismatic items" manufactured after November 29, 1973, be marked with the word "Copy."

The complaint in this matter was issued on January 17, 1977, and charged respondents with violations of the Hobby Protection Act by virtue of their importation into the United States of gold coins alleged to constitute "imitation numismatic items," which did not bear the word "Copy." A brief trial before Administrative Law Judge (hereinafter "ALJ") Lewis Parker led to his initial decision, finding violations of law as to certain of the imported coins, but not as to others. Judge Parker entered an order to cease and desist against the corporate respondent Gold Bullion International, Ltd., requiring that it refrain from future violations of the Hobby Protection Act and notify past [2] purchasers of certain unmarked coins that such coins had been sold in violation of the Act and that the purchasers would have a private right of action as provided by the Act (15 U.S.C. 2102). Judge Parker omitted an order against individual respondents Costello, Thompson, and Bogart.[1] This matter is before the Commission upon cross-appeals of the parties, with respondents urging that no violations have occurred and that no order should be entered, while complaint counsel assert that more violations should have been found and the ALJ's order should extend to the individuals.

A. *The Respondents and Their Coins*

Respondent Gold Bullion International, Ltd. is a New York State Corporation, created for the purpose of importing, selling, and

[1] Two other respondents in this case, an individual B.H. Mayer, and the mint that manufactured the coins in question, B.H. Mayer's Kunstprageanstalt, were dropped from the case after they signed consent orders.

distributing gold bullion coins and gold bullion products directly to consumers and to coin dealers for resale. (I.D. 1-2)[2] Gold Bullion enjoyed a brief, but not unnoticed operating history, importing coins and bullion from October 1974, until February 1975, when it discovered that U.S. Customs had become the principal collector of its coins. The corporation remains in existence only [3] for the purpose of prosecuting certain civil litigation. Individual respondents Costello, Thompson, and Bogart were respectively the president, vice-president and treasurer, and secretary and legal counsel to Gold Bullion. Each contributed $5000 to the corporation's initial capitalization, and, along with respondent Bernard Mayer, were the corporation's sole stockholders. These four individuals were the only officers of the corporation, and were responsible for its ownership and operation. (I.D. 11) Messrs. Costello and Thompson were responsible for the daily operation and management of the company. (I.D. 15)

The coins imported by Gold Bullion were manufactured for it by B.H. Mayer's Kunstprageanstalt, a private German mint. They were not intended for the use of any government, and did not bear the word "Copy" on them. The coins manufactured by B.H. Mayer's for Gold Bullion, imported into the United States, and at issue in this appeal are:

German 5 Mark
German 10 Mark (dated 1887 with image of Kaiser Wilhelm I)
German 10 Mark (dated 1888 with image of Kaiser Wilhelm II)
German 20 Mark (dated 1887 with image of Kaiser Wilhelm I)
German 20 Mark (dated 1888 with image of Kaiser Wilhelm II)
French 10 Franc
Mexican 50 Peso[3]

B. *Date of Manufacture*

A threshold issue is whether the coins in question were manufac-

[2] The following abbreviations will be used throughout:
I.D. - Initial Decision (finding no.)
I.D. p. - Initial Decision (page no.)
Tr. - Transcript of testimony (page no.)
CX - Complaint counsel's exhibit no.
RX - Respondents' exhibit no.

[3] The complaint also alleges violations with respect to Austrian 100 Corona and 1 and 4 Ducat coins, but these were dismissed by the ALJ (I.D. 57-58; p.23) and complaint counsel have not appealed from this ruling.

tured after November 29, 1973, because the requirements of the Hobby Protection Act apply only to "imitation numismatic items manufactured after the date of enactment of this Act." (15 U.S.C. 2106) [4]

There is no dispute that all the Mexican 50 peso coins were manufactured after November 29, 1973, because the die for this coin was made specifically by B.H. Mayer's for Gold Bullion, after the latter's formation in Fall, 1974. (I.D. 32) Respondents, however, object to the ALJ's findings that at least some samples of each of the other coins in issue were made after November 29, 1973.

B.H. Mayer's Kunstprageanstalt maintained no records of the date of manufacture of its coins. Instead, the ALJ relied upon the testimony of Mr. Mayer, who indicated that he had only a small supply of marks and francs in stock at the time he began shipping to Gold Bullion (in October, 1974) and that this stock did not last more than one or two weeks. (Tr. 135–36) Assuming, therefore, *arguendo* that the small stock of coins existing in October, 1974, 11 months after the effective date of the Act, was itself manufactured before November 29, 1973, it would nevertheless be true that at least some of the coins shipped to Gold Bullion were manufactured subsequently, once the inventory on hand in 1974 ran out.

Other facts of record lend support to the ALJ's conclusion on this point. The die for the French 10 franc coin was apparently manufactured close to the effective date of the Hobby Protection Act so that Mr. Mayer could not be sure whether it was before or after. (Tr. 122) Consequently, it seems most unlikely that a significant supply of francs would have been minted before the effective date of the Act and still have been in existence when the time came, nearly one year after the Act's effective date, to ship to Gold Bullion.

With respect to the reichmarks, (the dies for which were manufactured long before the effective date of the Act, Tr. 122) B.H. Mayer's sold supplies of the coins continuously to German customers, and Mr. Mayer testified that his practice was to mint large supplies of these coins in response to specific orders, rather than in anticipation of them. (Tr. 141) Accordingly, we find it quite likely that part or all of even the small inventory existing in 1974 to which Mr. Mayer made reference (Tr. 135–36) was manufactured after the effective date of the Act, as well as other reichmarks subsequently manufactured for Gold Bullion when the inventory was depleted. [5]

Respondents' counter to the evidence cited above consists of the testimony of respondents Costello and Thompson, who indicated that when they visited the mint, in February 1975, and August 1974, respectively, they observed large inventories of reichmarks, alleged-

ly contrary to the claim of Mr. Mayer. Mr. Costello's testimony, however, seems of doubtful relevance because he visited somewhat later than the time period to which Mr. Mayer's testimony referred.[4] With respect to Mr. Thompson's testimony, the ALJ presumably concluded that greater weight and credibility was to be attached to the recollection of Mr. Mayer, the mint owner and operator, who was likely to have most familiarity with the state of his inventory. We see no reason to disturb the judge's evaluation on this issue of witness credibility.

For the foregoing reasons, we believe that a substantial and preponderant quantity of record evidence supports the view that many, if not all of the coins imported by Gold Bullion were manufactured after the effective date of the Hobby Protection Act.[5]

C. *"Original Numismatic Items"*

Respondents further contend that the original coins of which theirs are copies are not "original numismatic items" within the meaning of the Act because they have not been shown to "ha[ve] been a part of a coinage or issue which has been used in exchange." 15 U.S.C. 2106. Respondents' objections with respect to the European coins in question apparently go simply to the weight of the evidence as to these coins' usage. Their objection with respect to the Mexican 50 Peso coin involves the definition of the term "used in exchange." [6]

We believe that the law judge's interpretation of the statutory language is correct. Respondents argue, in essence, that the term "used in exchange" should be confined to "legal tender," thereby excluding coins that may have been issued principally for the purpose of disposing of governmental supplies of gold, and the value of which has fluctuated in relation to the price of gold.

Had Congress meant to confine the Act's application to once-valid "legal tender," however, we think it could and would have used that term. Instead it used statutory language that plainly denotes more than simply "legal tender." Coins or other issue may be traded for goods and services in a society notwithstanding that they were not created for that express purpose and are not recognized by a government as legal tender.[6] Coins are "used in exchange" if they

[4] Existence of large stacks of coins in February 1975 would most likely have been attributable to production undertaken for Gold Bullion itself.

[5] We do note, however, that the record lacks clear proof that more than one 20 Mark Wilhelm I (1887) was imported. Given the profusion of evidence as to other coins, we shall drop this one coin from consideration.

[6] "Legal tender" is defined by one source as "that kind of coin, money, or circulating medium which the law compels a creditor to accept in payment of his debt, when tendered by the debtor in the right amount." *Black's Law Dictionary* 1637 (Rev. 4th ed. 1968)

(Continued)

have been, as the law judge observed, "actively traded in the marketplace and . . . used as a means of payment." (I.D. p. 19)

Moreover, this most plausible facial construction of the statute finds support in the legislative history. As the ALJ observed, there was testimony before Congress that silver ingots were once "circulated as money or exchange" during the silver-rush days of the Old American West. Congressman Eckhardt, presiding at the hearings, agreed that the ingots had been "used in exchange" and it was explained, without subsequent contradiction or dissent in the legislative history, that the term "covers a waterfront." Bills to Protect Certain Hobbyists and Collectors of Antique Glassware and China. Hearings on H.R. 4678, H.R. 1068, H.R. 3668, H.R. 3747, H.R. 4551. Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 93d Cong., 1st Sess. (1973), p. 47. [7]

Respondents claim to find support in the declaration of both House and Senate that the Act was designed to fill the void in the counterfeit laws:

> The Federal counterfeit laws (18 U.S.C. Chapter 25) are sufficient to prevent the manufacture or importation of *imitations of existing currency.* However, there are no comparable provisions of Federal law which provide protection from imitation numismatic items or political items. The legislation reported by the Committee on Commerce is designed to fill this void. S. Rep. No. 98–354, p. 3; H.R. Rep. No. 93–159, p. 4 (emphasis added.)

This language, quoted at p. 12 of respondents' Appeal Brief tells us only that Congress perceived the gap in the counterfeit laws to be their failure to cover imitations of no longer "existing *currency.*" If anything, such language favors an expansive interpretation of the Hobby Protection Act, because "currency," rather than meaning simply "legal tender," generally refers to

> That which is in circulation or passes from hand to hand, as a medium of exchange, including coin, government notes, and bank notes; as, the silver *currency;* the note *currency.* The term *currency* includes as well the part circulating at its market value (for example, gold coins in the United States) as the part that owes more or less of its purchasing power to government fiat or to its representative character (as paper money, subsidiary coins, or bank notes.). . . . *Webster's New International Dictionary,* 2d ed., p. 648.[7]

"The word 'money', in its generic sense, is one of comprehensive import, and includes any lawful circulating medium of exchange. . .[a]ll legal tender is money, but not all money is legal tender." *Vick* v. *Howard,* 136 Va. 101, 108–09, 116 S.E. 465, 467–68 (1923).

[7] The same dictionary notes that "legal tender" is merely "*That currency,* or money, which the law authorizes a debtor to tender and requires a creditor to receive in payment of money obligations." Id. 1412. *Cf. Tyson* v. *United States,* 285 F.2d 19, 21 (10th Cir. 1960), distinguishing between coins that are "legal tender" and coins that are "accepted as currency in fact by circulation."

For the foregoing reasons, we conclude that the Hobby Protection Act applies to imitations of coins that at one time have been actively traded in the marketplace, and used as a means of payment. [8]

The most pertinent application of this holding is to so-called "governmental restrikes"[8] that have been used in exchange. Such restrikes are, of course, at once both copies of earlier issues as well as original issues in their own right, and they may often assume significant numismatic value. (Tr. 231) When "used in exchange" we believe that government restrikes become "original numismatic items" within the contemplation of the Act and copies of such restrikes must be appropriately marked.[9]

Applying the foregoing to the 50 Peso Mexican coin, it is clear from the testimony of experts called by both sides that this coin, although traded primarily on the basis of its gold value, and not recognized as "legal tender," has nevertheless been "used in exchange" within Mexico. (Tr. 218; 534–35)

With respect to the European coins, respondents contest the weight of the evidence indicating that they were circulated as currency within their respective countries. Here, again, we believe that the evidence preponderates in favor of complaint counsel's position. The record shows that specimens of the 1862 Napoleon III 10 franc coin copied by Gold Bullion are in the public domain, and complaint counsel's expert testified that the coin was struck for circulation. (Tr. 207). We believe such evidence was sufficient to create a *prima facie* showing that the coin had been used in exchange, and respondents submitted no evidence to contradict that showing. [9]

With respect to the German 5 Reichmark coins, the record again reflects that the originals that Gold Bullion copied were issued by the German government, (Tr. 234) and samples remain in the public domain nearly a century after issuance, as evidenced by the fact that complaint counsel's expert had examined many of them. (Tr. 234) Moreover, from our review of the record it appears that the testimony by Messrs. Mayer and Stack that the coin was "used in exchange" (Tr. 26, 85, 248) referred to the 1887 Wilhelm I, 5 Mark coin of which Gold Bullion's version was an imitation.

[8] One expert witness stated that in his view the term "restrike" should apply only to coins minted by governments. (Tr. 221) Gold Bullion, however, used the term "restrike" to apply to reproduction by a private mint, for non-governmental purposes, of coins originally minted by or for governmental units. Although the issue was not involved in the case, it is clear that there is sufficient opportunity for deception in use of the term "restrike" to apply to private reproductions, so that any such use of the term should, at a minimum, be qualified by language in immediate proximity to it.

[9] The Commission has exempted by rule restrikes (by the United States or any foreign government) of original numismatic items, 16 C.F.R. 304.1(d), but this regulation did not become effective until after Gold Bullion had begun importing, and in any event, has no applicability to Gold Bullion's non-governmental restrikes.

Finally, as regards the 10 and 20 mark coins that are the subject of complaint counsel's appeal (part "D" *infra*) we think the judge also properly concluded that these were used in exchange (I.D. 42, 44, 46, 51). All the relevant coins were issued by the Berlin mint and complaint counsel's expert testified that they were used in exchange. (Tr. 248)[10]

D. *"Imitation Numismatic Item"*

The ALJ found that no violation had occurred with respect to Gold Bullion's 20 Mark Wilhelm II (1887), 10 Mark Wilhelm I (1887) and 10 Mark Wilhelm II (1888) coins, because coins of those precise descriptions were never circulated by the German government. Therefore, Gold Bullion's coins were presumably not "copies" of an "original numismatic item." (I.D. 46, 51; p. 18n) In reaching this conclusion we believe the ALJ misapplied the language of the Hobby Protection Act, and we reverse his conclusions on this point, and hold that violations have occurred as the result of importation of the coins in question. [10]

The German government never issued a 20 Mark Wilhelm II coin in 1887, doubtless out of respect for Kaiser Wilhelm I, who occupied the throne throughout that year. (Tr. 245) Germany did, however, issue a 20 Mark Wilhelm II coin dated 1888. Similarly, it issued a 10 Mark Wilhelm I in 1888, (instead of 1887 as marked on Gold Bullion's coins) and a 10 Mark Wilhelm II in 1889 (instead of 1888 as marked on Gold Bullion's coins.)

The Hobby Protection Act plainly does not require marking only of coins that are exact replicas, in every detail, of original government coinage.[11] Rather, an "imitation numismatic item" is defined as a "reproduction, copy or counterfeit of an original numismatic item." [15 U.S.C. 2106(4)] While we are left for an elucidation of the meaning of "reproduction" and "copy" to the dictionary, or cases drawn from such relatively remote areas as copy right law[12] we need not write upon a legally barren slate when construing the meaning of "counterfeit." [11]

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[10] Although respondents contend that this testimony did not relate to the specific coins at issue here, we think it plain from the record that complaint counsel's question and Mr. Stack's answer at Tr. 248 referred to the particular mark coins as to which complaint counsel had just been questioning Mr. Stack at Tr. 243–245, which are the ones at issue here.

[11] Indeed, it is not clear that there is such a thing as an "identical copy" because no matter how competent a private mint may be, its version of an original government issue will likely deviate from the original issue in certain minor respects, for example, coloration, sharpness and detail of imagery or edge devices (Tr. 206–7). Such differences of course, would only be apparent, if at all, to the most skilled experts, and even they may be fooled. The Hobby Act was designed to guard against copies that the ordinary collector could not recognize as such. The question here, then, is whether a deviation of one year in the date is a sufficiently large deviation as to render the coin neither a "copy, imitation, or counterfeit" of the original.

[12] Complaint counsel cite cases defining "copy" as "that which ordinary observation would cause to be

(Continued)

As both parties acknowledge, and as the legislative history makes clear, the Hobby Act was in essence intended to fill in the gaps left by the criminal counterfeit laws, 18 U.S.C. 471, *et. seq.*, which forbid counterfeits of existing media of exchange but do not extend to counterfeits of coins that are no longer, but in the past "ha[ve] been used in exchange." 15 U.S.C. 2106(3). It seems quite appropriate, therefore, that in seeking to determine what constitutes a "counterfeit" of an "original numismatic item" we look first to see what Congress and the courts have concluded constitutes a "counterfeit" of currently valid items of exchange.

Courts construing the criminal counterfeit statutes have recognized that the alleged counterfeit need only be "sufficiently complete to be an imitation of and to *resemble* the genuine article." *United States* v. *Johnson,* 434 F.2d 827, 830 (9th Cir. 1970) emphasis added. The likeness or resemblance must be one such "as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest." *United States* v. *Smith,* 318 F.2d 94 (4th Cir. 1963). It is not necessary that the similarity be so great as to deceive experts or cautious persons. *United States* v. *Weber,* 210 F. 973, 976 (W.D. Wash. 1913); *United States* v. *Sprague,* 48 F. 828 (D.C. Wis. 1882). Applying these standards, courts have recognized that a "counterfeit" coin may embody fairly significant deviations from the genuine issue it is designed to copy. For example, a photocopy of a $10 dollar bill was found to be a counterfeit, *U.S.* v. *Johnson, supra* 424 F.2d at 829, as was an instrument that resembled ten-dollar federal reserve notes although lacking two serial numbers and the treasury seal on its face. *United States* v. *Chodor,* 479 F.2d 661, 664 (1st Cir.), *cert. denied* 414 U.S. 912 (1973).

Applying these principles here,[13] we think it plain that a deviation of one digit in the date on a coin is not likely to distinguish it sufficiently from the original [12] to alert an "unsuspecting person of ordinary observation and care" whom the criminal counterfeit law protects, let alone the "ignorant, unthinking and credulous" who are not excluded from the protection of civil consumer law. *Aronberg* v. *FTC,* 132 F.2d 165 (7th Cir. 1942); *Exposition Press, Inc.* v. *FTC,* 295 F.2d 869 (2d Cir. 1962).

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recognized as having been taken from or the reproduction of another," *King Features Syndicate* v. *Fleischer,* 299 F. 533, 535 (2d Cir. 1924) and "that which comes so near to the original as to give every person seeing it the idea created by the original." *White-Smith Music Publishing Co.* v. *Apollo Co.,* 209 U.S. 1, 17 (1907); *McConnor* v. *Kaufman,* 49 F. Supp. 738, 745 (S.D.N.Y. 1943). We reach an essentially similar result here.

[13] The ALJ apparently recognized the applicability of the standard we have articulated because in finding no violations as to the marks in question he concluded that "there is no reliable evidence in the record that suggests that consumers would confuse the Gold Bullion 10 Mark coins with the originals." (I.D. 46) In fact, as we note in the text, the record contains abundant evidence to support a finding or deceptive potential.

While those who ordinarily deal in coins may well possess a degree of knowledge as to coins superior to that of an average member of the public, it is nevertheless likely that a purchaser lacking access to a manual (and one which he or she is prepared to trust) listing the precise dates of issue of the coins in question, might be fooled as to the authenticity of a coin identical in all respects but the date of the original issue. This is, moreover, not mere inference on our part.[14] Complaint counsel's expert witness, whose business it is to deal with coin collectors, and who, therefore, knows better than most people what is likely to mislead such collectors, testified that in his view slight variations in the date of a reproduction might well be insufficient to alert some collectors as to the coin's lack of authenticity. Moreover, this expert backed up his opinion by mentioning cases in which customers had taken for real, counterfeits of old American coins that differed from the real ones only in their date. (Tr. 312–13). [13]

Further confirmation that the 10 and 20 mark coins here in question were sufficiently like the original German issue as to be reasonably mistaken for them comes from respondents' own promotional material, in which all of Gold Bullion's coins were described as "*re*strikes of Gold Coins from Europe and other countries."[15] CX 45(e)(4), emphasis added. Unless respondents were deliberately misrepresenting the truth, which they strenuously deny ever having done, then we can only assume that the resemblance of their coins to the original government issues was sufficiently great as to convince these highly knowledgeable parties that they were selling a "reproduction, copy or counterfeit" (*i.e.*, a *re*strike) of "original numismatic items."

Ignoring their prior representations to consumers, respondents argue that the date of a coin is one "material factor" in its definition, citing for support excerpts from the *Standard Catalog of World Coins* (RX 43). But all that this catalog points out is that the date borne by a coin is one important factor by which one may identify the coin and verify its authenticity. (RX 43f). This does not mean that an alteration of one digit in the date on an imitation of an

[14] Such an inference, however, would not be unwarranted in the exercise of the Commission's expertise. In the typical counterfeit case the court or jury must determine for itself whether the alleged counterfeit bears sufficient resemblance to the original as to be capable of being mistaken for it. There is no necessity to demonstrate that the counterfeit has actually been successfully passed off, only that the effort has been made. By the same token, it is the Commission's proper function to infer that a coin bears sufficient resemblance to an original as to constitute a counterfeit of it under the Hobby Act, notwithstanding the absence of evidence of deception.

[15] Respondent Thompson testified that "[t]he term restrike to me means a reproduction of an existing coin," (Tr. 439), which definition he quickly expanded to include "a coin that has existed. . .[a]t one time." (Tr. 439) Having represented *all* of their coins as being reproductions of originals in their promotional materials, respondents are in a peculiarly poor position to assert before the Commission that any of their coins is not a "reproduction, copy or counterfeit" of such originals.

original renders the copy no longer a "counterfeit" capable of fooling one who does not consult the *Standard Catalog of World Coins,* just as the use of fake serial numbers or the omission of serial numbers entirely would not suffice to remove an imitation $10 note from the purview of the counterfeit laws. *United States* v. *Chodor, supra,* 479 F.2d at 664. [14]

The position of respondents seems to be that there are certain features of a coin that determine its "identity" or "essence," which are the date, and that a simulation that fails to embody in precise detail that "essence" is neither a "reproduction, copy, or counterfeit," regardless of what a purchaser might believe. This approach, however, lacks foundation in the wording of the statute or in its history and intent, and would create insuperable problems of construction.[16] [15]

For the foregoing reasons, we conclude that a coin is an "imitation numismatic item" within the meaning of the Hobby Protection Act if it is not sufficiently different from an original numismatic item as to alert an unsuspecting purchaser to the difference. Applying that principle here, we find that minor variations in dates between an original and its alleged "copy" are insufficient to deprive the latter of its status as a "reproduction, copy or counterfeit" of an "orginal numismatic item" and do not eliminate the requirement that the latter be marked with the word "Copy." Accordingly, respondents violated the law by their failure to mark "Copy" upon their 10 Mark Wilhelm I (1887), 10 Mark Wilhelm II (1888), and 20 Mark Wilhelm II (1887).

E. *Liability of Individual Respondents*

The administrative law judge determined that no order should be entered against the individual respondents in this case, although he found that they were responsible for the activities and law violations of Gold Bullion. In the law judge's view, no order is needed because of

The absence of proof of conscious, purposeful violations of the law coupled with

[16] For example, another "basic attribution consideration" of a coin is its nationality, which encompasses the symbols and figures imprinted on the coin. (RX 43) Does this mean, therefore, that a private mint can avoid the Hobby Act's requirements by placing a mustache, or 5 o'clock shadow, on the face of a Kaiser or King who was clean-shaven on the original? Unless the meaning of "reproduction, copy, or counterfeit" is made to turn upon the reasonable possibility that the coin in question could be mistaken for an original, there is no practical way to give meaning to the statutory language, or to protect it from ready evasion.

The approach we take here is not meant to read into the Hobby Protection Act a necessity to show "deception" that Congress clearly abjured. In passing the Act, Congress *presumed* that copies of original numismatic items could deceive collectors, and, therefore, required that all of them be marked. With respect to coins that are plainly copies, it is no defense under the law to argue that no collector has (yet) been deceived. The question of "capacity to deceive" arises only where, as with the 10 and 20 mark coins in this case, the alleged "imitation numismatic items" vary in certain minor respects from originals, so that there is doubt as to whether they are "reproduction, copy, or counterfeit" within the meaning of the Act.

testimony that all three respondents are gainfully employed in fields totally unrelated to the marketing of gold coins and have no intention to become involved in a business similar to Gold Bullion. . . (I.D. p. 21)

We believe that the law judge's conclusion is in error for several reasons. In the first place, respondents' present intention not to become involved again in the sale of imitation numismatic items offers very little guarantee to the public that they will not undertake such a business in the future. Nor does the fact that respondents are gainfully employed in fields unrelated to the marketing of gold coins afford such protection. Respondents were also gainfully employed outside the numismatic area prior to their formation of Gold Bullion, and there are no objective circumstances that would preclude, or minimize the likelihood of their re-entering the coin business in the future. Indeed, the expertise they have gathered in that area from their operation of Gold Bullion would seem to increase the chance that one or more of them might return to this area as a primary or secondary occupation in the future. [16]

Secondly, ignorance, or disregard of the law is no defense to entry of an order against one who has violated the law for those reasons. The evidence indicates that when respondents began the operation of Gold Bullion they were ignorant of the requirements of the Hobby Protection Act. It appears that in Gold Bullion's final days, that ignorance was remedied by respondents' receipt of a letter from Federal Trade Commission staff informing them of the law's requirements. Notwithstanding their receipt of a copy of the law, respondents halted the importation and sale of unmarked imitation numismatic items only as a result of seizure by the Customs Service of their coins, not as a result of reading and applying the law.[17]

In any event, if respondents have been capable of ignoring the law, or misconstruing its requirements in the past, there is no reason to assume they may not do so in the future. To conclude that an order should be entered against them, there need not be reason to question respondents' good faith. There is no evidence in the record that they have sought to mislead anyone, and one may presume that their violations resulted until January 10, 1975 or so from ignorance of the law, and thereafter, at most, from good faith disagreement with the views of FTC staff that they were violating it. However, one purpose of a lawsuit is to resolve such good faith disagreements, and to

[17] The record indicates that on approximately January 10, 1975, Gold Bullion received from Federal Trade Commission staff notification that their coins were suspected of violating the Hobby Protection Act, along with a copy of the Act. (Tr. 465–66; RX 12). Nevertheless, respondents imported a shipment of coins as late as January 30, 1975 (Tr. 467–68; CX 18–19), despite the availability of a telex machine (Tr. 464) that could have been used to halt the shipment from Germany, and they sold gold coin replicas in the United States as late as February 6, 1975. (Tr. 468).

ensure future adherence to the law, notwithstanding what may continue to be one side's good faith belief that it has done no wrong. Entry of an order is the customary and surest means of accomplishing this. [17] Accordingly, we believe that protection of the public interest and prevention of recurrence of violations requires that the order entered against Gold Bullion[18] also extend to the individuals who founded, operated, and controlled it, and were responsible for its practices. *Virginia Mortgage Exchange, Inc.*, 87 F.T.C. 182, 202–03; *Peacock Buick, Inc.*, 86 F.T.C. 1532, 1565 (1975), *aff'd.* 553 F.2d 97 (4th Cir. 1977).

We have, however, modified the boilerplate reporting requirement proposed by complaint counsel, so as to require only that respondents report to the Commission, for a ten year period, any affiliation by them with a business involving numismatic or political items. As a result, aside from requiring the routine filing of a compliance report in 60 days, the order we enter will impose absolutely no obligations upon respondents of any sort so long as they are not involved in occupations that would be subject to the Hobby Protection Act. [18]

F. *Notice to Consumers*

The administrative law judge ordered respondents to send letters to purchasers of those coins as to which he found that violations had occurred, notifying them of the violation and of the fact that they would have a private right of action under the law. While this is an entirely proper remedy for Hobby Protection Act violations, we have determined to omit the requirement under the precise circumstances of this case.

The record reflects that Gold Bullion's coins were sold principally for their gold value. Prices fluctuated daily based upon the value of gold. Of course, Gold Bullion's coins sold at a premium over the world spot price of bullion, the premium varying with the particular type of coin. While Gold Bullion asserts that the literature accompanying its coins was sufficient to place all purchasers on notice that its coins were no more than private mint copies, it is possible that the premiums that Gold Bullion's coins commanded were, in some measure, a function of consumers' mistaken beliefs that the coins were government issue.[19] However, even under these

[18] We reject respondent's contention that no order should enter against Gold Bullion itself. If the corporation is finally liquidated the order will be moot, but if it should continue to remain in existence it is entirely appropriate that it be placed under order to prevent recurrence of its illegal conduct.

[19] The premiums may also be due in varying measure to such factors as the services provided by Gold Bullion in obtaining, packaging, and merchandising the gold, as well as the aesthetic value of the coin. There is record evidence to indicate that government-minted coins are better vehicles for the exchange of gold than those created

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circumstances, the premium would have constituted only a small fraction of the purchase price and come to only a few dollars.

For the foregoing reasons, we suspect that whatever private rights of action might be available to the *immediate purchasers* of Gold Bullion's coins would not be substantial. Moreover, the notice in question would have considerable capacity to mislead such purchasers, both because of the generally limited value of their private right, and, also, [19] because there may be some question as to the date of manufacture of individual coins and therefore as to whether particular individual recipients of the notices would have any rights at all.[20] Weighing the opportunities for deception of consumers against the likely minimal benefits to be derived from a notice in this case, we believe that it should be omitted.

The foregoing is not to say that there have not been or may not in the future be major victims of the law violations in this case. Such victims, however, seem most likely to be those who may repurchase Gold Bullion's coins from original or subsequent purchasers, absent the accompanying disclosures of private origin that Gold Bullion itself may have made. There can be little doubt that the original government versions of the coins that Gold Bullion has copied may now have, or in the future may come to possess, numismatic value far in excess of their gold content. (Cf. Tr. 228–29) The coins that Gold Bullion has placed into the stream of commerce may, therefore, be resold for many times their true value, to the severe detriment of those who purchase them. Although respondents have repeatedly insisted that they cannot be responsible for the sharp practice of others, that is precisely their responsibility under the law. Congress, when it enacted the Hobby Protection Act, was specifically concerned with the problem of unidentified copies of originals that might be sold [20] initially with disclosure of their counterfeit status, but could then be resold without such disclosure.[21] Accordingly, it placed upon those in the best position to bear it, the obligation to

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by private mints, because governments are widely assumed to have a greater stake in preserving the integrity of their issue. (Tr. 309) Such issue is, therefore, likely to trade more freely, with less need for assay, and, as a result, to command a higher premium. In any event, the extent to which the value of a gold coin results from perceptions of its origin may vary among individual consumers.

[20] As noted, we have no doubt that most of the coins manufactured by B.H. Mayer's Kunstprageanstalt for Gold Bullion postdated November 29, 1973. However, some may not have. While this state of facts is quite sufficient to establish violation of the Hobby Protection Act, a court trying a private case might not find it sufficient to establish violation in the case of any particular coin. Then again, the court might well conclude that respondents' lack of record-keeping cannot be allowed to immunize them from liability, and rule for plaintiffs. The issue, however, is obviously one that could cloud private litigation. To avoid deception, any notice to consumers would have to be cast in sufficiently equivocal terms as to avoid misrepresenting the likelihood of success.

[21] "Many museums and similar institutions reproduce numismatic items in their collections which are sold with literature or packaging which clearly indicate that the items are reproductions. Unfortunately, the article and literature or packaging indicating that the coin is a reproduction may subsequently be separated. These coins, too, are subsequently sold or traded as originals." S. Rep. 93–345, p. 2; *See also* H.R. Rep. 93–159, pp. 3–4.

mark such counterfeits with the word "Copy." Affixation of the word "Copy" to Gold Bullion's coins would guarantee that those coins could never be passed off as originals, and it is obviously the importer or domestic manufacturer, as the law prescribes, who is in the best position to accomplish this simple task. However, the damage in this case has been done; notification of immediate purchasers is unlikely to accomplish any significant benefit; and a "recall" of the offending coins for imprinting does not appear practical. Accordingly, the notification provisions of the proposed order will be omitted.

To help guarantee that others will not violate the Hobby Protection Act in the future, however, we have, in addition to entering the appended order, also prepared a synopsis of our determinations in this case. This will facilitate application of the Commission's holdings in this case to others who may engage in the same practices as respondents have been engaged in, pursuant to the provisions of 15 U.S.C. 45(m)(1)(B), [§205 of the Magnuson-Moss Act]. That synopsis appears on the following page.[22]

ATTACHMENT

SYNOPSIS OF DETERMINATIONS FOR 15 U.S.C. 45(m)(1)(B) GOLD BULLION INTERNATIONAL, LTD., DKT. 9094

It is unlawful under the Hobby Protection Act (15 U.S.C. 2101, *et seq.*) and an unfair or deceptive act or practice under Section Five of the Federal Trade Commission Act (15 U.S.C. 45) to manufacture in the United States or import into the United States, for introduction into or distribution in commerce, any "imitation numismatic item"[1] which is not plainly and permanently marked "COPY."[2]

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[22] The Commission's decision to prepare a synopsis of its determinations in this case is undertaken in the exercise of its discretion, in order to simplify application of those determinations to other cases. Such a procedure is not required by 15 U.S.C. 45(m)(1)(B).

[1] An "imitation numismatic item" is an item which purports to be, but in fact is not, an "original numismatic item"(a) or which is a reproduction, copy or counterfeit of an "original numismatic item." Imitation numismatic items include not only those items that are exact replicas in every detail of original numismatic items, but in addition, they include items that might reasonably be mistaken for "original numismatic items" by an unsuspecting consumer exercising ordinary observation and care. For example, a coin that resembles an "original numismatic item" in all respects except for a minor variation in the date would still be an "imitation numismatic item."

(a) An "original numismatic item" is anything that has been a part of a coinage or issue which has been used in exchange or has been used to commemorate a person or event. The term includes coins, tokens, paper money, and commemorative medals. An item has been "used in exchange" if it has been traded in the marketplace and used as a means of payment. Thus, the term applies to more than simply "legal tender."

[2] Rules issued by the Federal Trade Commission require that the word "COPY" shall be marked upon the item legibly, conspicuously and nondeceptively. The word "COPY" shall appear in capital letters, in the English language. The word "COPY" shall be marked on either the obverse or reverse surface of the item. It shall not be marked on the edge of the item. An imitation numismatic item of incusable material shall be incused with the word "COPY" in sans-serif letters having a vertical dimension of not less than two millimeters (2.0 mm) and a

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FINAL ORDER

This matter has been heard by the Commission upon the cross-appeals of complaint counsel and respondent's counsel from the initial decision and upon briefs and oral argument in support and in opposition to each appeal. The Commission, for the reasons stated in the accompanying Opinion, has granted portions of the appeals of each side. Therefore,

It is ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except for Findings 46; 51; the words "German 20 Mark 1887 Wilhelm I" in finding 66; 67; 76–77; page 18, footnote; page 19, all of footnote after word "testimony"; page 21, second paragraph, everything after semi-colon; page 21, third, fourth and fifth paragraphs; page 22, second full paragraph; page 23, findings 6 and that part of 7 following the comma; pp. 23–25 "Order."

Other findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion. [2]

It is further ordered, That the following order to cease and desist be entered:

ORDER

It is ordered That respondents Gold Bullion International, Ltd., a corporation, its successors and assigns, and its officers, and H. Kenneth Costello, Walter N. Thompson, and William H. Bogart, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation or distribution in or affecting commerce (as defined in Section 4 of the Federal Trade Commission Act; 15 U.S.C. 44) of any imitation numismatic item, as "imitation numismatic item" is defined in the Hobby Protection Act (Pub. Law 93–167, 15 U.S.C. 2101, *et seq.*), do forthwith cease and desist from:

> Importing, manufacturing or distributing any imitation numismatic item that is not plainly and permanently marked "COPY" as required by Section 2(b) of the Hobby Protection Act and the regulations promulgated thereunder. The word "COPY" shall appear in conformance with 16 C.F.R. §304.6, *i.e.*, in capital letters, in the English language, incused in sans-serif letters having a

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minimum depth of three-tenths of one millimeter (0.3 mm) or to one-half the thickness of the reproduction, whichever is the lesser. An imitation item composed of nonincusable material shall be imprinted with the word "COPY" in sans-serif letters having a vertical dimension of not less than two millimeters (2.0 mm). In either case, the minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0 mm).

vertical dimension of not less than two millimeters (2.0mm) and a minimum depth of three-tenths of one millimeter (0.3mm) or one half (1/2) the thickness of the reproduction, whichever is the lesser. The minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0mm).

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is furthered ordered, That for a period of ten years from the effective date of this order, each individual respondent named herein promptly notify the Commission of [3] any affiliation with a business or employment that involves the manufacture in the United States or importation into the United States of numismatic or political items. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business of employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

THE TIMES-MIRROR COMPANY

Docket 9103. Interlocutory Order, July 25, 1978

This order grants the appeal of complaint counsel for reinstatement of count II of the complaint, dismissed by order of the administrative law judge.

ORDER GRANTING COMPLAINT COUNSEL'S APPEAL FROM ORDER DISMISSING COUNT II OF THE COMPLAINT

On July 27, 1977, the Commission issued its complaint in this matter alleging violations of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) in connection with respondent's sale of retail advertising in The Los Angeles Times.

This matter is now before the Commission on appeal by complaint counsel, pursuant to Section 3.23(b) of the Commission's Rules of Practice, from the order of the administrative law judge (ALJ) dismissing count II (the Robinson-Patman charge) of the complaint.[1] The ALJ ruled that newspaper advertising is not a "commodity" within the meaning of section 2(a) and, therefore, count II fails to state a claim upon which relief can be granted. For the reasons set forth below, we disagree with the ALJ's holding and reinstate count II of the complaint.

In reaching his decision, the law judge relied on court decisions holding that the term "commodities" is limited only to tangible products, not intangibles or services.[2] In addition, he looked to statements made after passage of the Robinson-Patman Act by one of its co-authors to the effect that such items as advertising, insurance and brokerage service are not commodities for purposes of the Act.[3] The judge also cited two recent district court decisions specifically holding that newspaper advertising is not a commodity within the meaning of Section 2(a) of the Robinson-Patman Act.[4] After reviewing these authorities, the ALJ concluded that, although newspapers are tangible goods, the respondent is selling "the service

[1] The allegations of count I of the complaint, relating to Section 5 of the FTC Act, are not at issue here.

[2] *E.g., Freeman* v. *Chicago Title & Trust Co.*, 505 F.2d 527 (7th Cir. 1974) (title insurance not a commodity); *Baum* v. *Investors Diversified Services, Inc.*, 409 F.2d 872 (7th Cir. 1969) (mutual fund shares not commodities); *Tri-State Broadcasting Co.* v. *United Press International, Inc.*, 369 F.2d 268 (5th Cir. 1966) (sale of news reports treated as sale of a privilege); *CBS* v. *Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961) (sale of broadcast advertising time not a commodity).

[3] W. Patman, Complete Guide to the Robinson-Patman Act (1963) at 33.

[4] *National Tire Wholesale, Inc.* v. *Washington Post*, 441 F. Supp. 81 (D.D.C. 1977), *appeal docketed*, No. 781148 (D.C. Cir. Feb. 22, 1978); *National Auto Brokers Corp.* v. *General Motors Corp.*, 1974-2 Trade Cases ¶75,281 (S.D.N.Y. 1974).

of taking the advertiser's message into a million homes, with its own circulation list and its own means of distribution." Thus, while both a service and a product are involved, "the dominant nature of respondent's business can best be characterized as the sale of a service and not the sale of commodities . . . ."

The specific question before us has never been formally addressed by the Commission[5] and the Supreme Court has expressly reserved ruling on the issue.[6]

Section 2(a) of the Robinson-Patman Act prohibits under certain circumstances discrimination in price between different purchasers of commodities of like grade and quality. It is clear that the Robinson-Patman Act applies only if a challenged price discrimination involves the sale of commodities. Price discrimination in noncommodity transactions, such as the furnishing of services, is not actionable under the statute.[7]

Although it is clear that the Act applies only to sales of commodities, the scope of that term is more ambiguous. Neither the original Clayton Act nor the Robinson-Patman amendments provide a definition of the term "commodities." The statutes do contain other references to "goods, wares, or merchandise"[8] and Section 3 of the Clayton Act, relating to exclusive dealing contracts, includes the language "goods, wares, merchandise, machinery supplies or other commodities . . . ."[9] While helpful, such language does not unambiguously clarify the reach of the term "commodities."

Moreover, the legislative histories of these statutes do not provide specific guidance as to what the term "commodities" encompasses.[10]

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[5] Shortly after passage of the Robinson-Patman Act, the Commission closed a section 2(a) matter concerning the sale of advertising space because it did not involve the sale of a commodity. 81 Cong. Rec. App. 2336–37 (1937). However, that same year the Commission issued an uncontested order under section 2(a) prohibiting price discrimination in the sale of a Christmas club savings plan which included the sale of passbooks, account books and advertising literature. *Christmas Club*, 25 F.T.C. 1116 (1937).

[6] In oral argument in *Times Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953), government counsel referred to the Commission action discussed in note 5 *supra*. In a footnote, the Court referred to this as an "early informal Federal Trade Commission opinion," and specifically stated that it expressed no views on the Commission's statutory interpretation. 345 U.S. at 609, n. 27.

[7] Sections 2(d) and 2(e) of the Act prohibit the furnishing of services or facilities on a discriminatory basis, but these sections are addressed to merchandising or promotional aids which are furnished by a supplier to customers in connection with a sale of products or commodities.

[8] The words, "goods, wares, or merchandise," which appear in Sections 2(a) and 2(c), were also contained in Section 2(a) of the Clayton Act.

[9] The term "commodities" in Section 3 has since been interpreted by one court as having essentially the same meaning as the words "goods, wares, or merchandise." *Baum* v. *Investors Diversified Services, Inc.*, *supra* note 2, at 875.

[10] Congress specifically excluded labor from the coverage of the Clayton Act, 15 U.S.C. 17, but other exclusions are not delineated in the statute. Further, at least some members of Congress apparently believed that insurance would be covered by the Act except for a Supreme Court ruling that insurance contracts and policies were not in interstate commerce. *See* 51 Cong. Rec. 9390 (1914).

However, similar language is contained in many state statutes which Congress looked to in passing the Clayton Act,[11] and court decisions construing these or related state antitrust laws have not adopted a restrictive definition of commodities.[12] Although the state precedent offers no unequivocal guide to Congress' intentions, it does suggest that Congress was more concerned about the overall thrust of the statute and that primary emphasis should be placed on defining the term "commodities" within that context, rather than attempting to draw unduly fine distinctions between tangible and intangible products.

Since the word "commodities" was carried over from the Clayton Act, it is not surprising that the legislative history of the Robinson-Patman amendments sheds little additional light on the meaning of commodities. What is clear is that Congress' concern with chain store buying practices focused attention on pricing activities involving products which are unquestionably tangible in nature. That is reflected, understandably, in statements made during consideration of the legislation leading to passage of the Robinson-Patman Act.[13] In addition, the language of the statute reflects emphasis on those types of transactions concerning clearly tangible goods, such as the reference in section 2(a) to price changes allowed for perishable or obsolescent goods. Representative Patman has since stated that the word "commodity" in its broadest sense could include items of trade other than those in tangible form, but that in the Robinson-Patman Act the term is used in an ordinary commerical sense to designate any movable or tangible thing.[14] Thus, in his opinion, advertising, insurance, brokerage service, and similar items would be excluded from the Act's coverage though they might be commodities in the broader sense.

In construing the Robinson-Patman Act, the courts have adopted the tangible/intangible dichotomy and consistently taken the position that the Act applies only to transactions which have tangible characteristics.[15] Although virtually no transfer of an

[11] A list of the 19 states which had enacted anti-price discrimination laws prior to passage of the Clayton Act is set forth in H.R. Rep. No. 627, 63 Cong., 2d Sess. 9 (1914).

[12] For example, in two state cases, one decided before and the other after enactment of the Clayton Act, courts found that telephone service, *McKinley Telephone Co.* v. *Cumberland Telephone Co.*, 140 N.W. 38, 40 (Wis. 1913), and electricity, *State* v. *Interstate Power Co.*, 226 N.W. 427, 433 (Neb. 1929), were commodities for purposes of the applicable statutes. However, as respondent points out, in the only reported case addressing the commodity issue under section 2(a) of the original Clayton Act, *Fleetway, Inc.* v. *Public Service Interstate Transp. Co.*, 72 F.2d 761 (1934), the court there distinquished the *McKinley* decision on the grounds that the Wisconsin statute went beyond the federal law by proscribing restraints on the supply as well as the price of "any article or commodity." *Id.* at 764. The court, though, ultimately concluded that discriminatory bus transportation rates were not covered by Section 2(a), a decision which is not inconsistent with the result we reach here.

[13] *See* Representative Patman's remarks in connection with introduction of his bill at 79 Cong. Rec. 9079 (1935).

[14] W. Patman, *supra* note 3.

[15] *See* cases *supra* note 2.

intangible such as a service, right or privilege can be accomplished without the involvement of tangibles,[16] the courts have held that the incidental existence of a tangible item will not suffice to bring a transaction within the Act's coverage. Rather it is the dominant or essential nature of the transaction which the courts have looked to in determining if it falls within the scope of the Act.[17]

Certainly there is no doubt about the Robinson-Patman Act's application to tangible products that are clearly identifiable as such. Nor is there any doubt that the Act was not intended to reach transactions of a purely service nature, as reflected in the *Fleetway* decision, *supra* note 12. The difficult issue arises where, as here, the transaction cannot be neatly categorized as either a service or tangible product. In our view the proper course is to construe the term "commodities" in light of the fundamental purposes and structure of the statute, rather than becoming preoccupied with metaphysical considerations about what is or is not a tangible product.

From that perspective, we conclude that it is consistent with the language and spirit of the Robinson-Patman Act to treat newspaper advertising as a commodity for purposes of Section 2(a). Clearly unjustified discrimination in the pricing of newspaper advertising space can adversely impact on competition at the retail level just as surely as price discriminations associated with the purchase and resale of products by retailers in the ordinary course of their business. More specifically, the transactions at stake here are amenable to the detailed provisions of the Act. In other words, the product sold (*i.e.*, newspaper advertising space) is sufficiently fungible in nature to be susceptible to the kind of non-discriminatory pricing contemplated by the legislative scheme.

Respondent contends, however, that the wording of the Robinson-Patman Act precludes its application to the instant transactions, citing provisions permitting price differentials based upon "differences in the cost of manufacture, sale, or delivery" and changes affecting the "marketability of the goods concerned," such as "deterioration of perishable goods," and "obsolescense of seasonal goods." To be sure, it is not likely that the latter exceptions would apply to newspaper advertising, as they probably would not be

[16] *E.g., Freeman* v. *Chicago Title & Trust Co., supra* note 2, 505 F.2d at 531; *Tri-State Broadcasting Co.* v. *United Press International, supra* note 2, 369 F.2d at 270.

[17] *See, e.g., Tri-State Broadcasting Co., supra* note 2 (right to broadcast news information, although news reports in written form); *General Shale Products Corp.* v. *Struck Construction Co.*, 132 F.2d 425 (6th Cir. 1942)(construction contract at stake rather then sale of bricks used in construction). *See also CBS* v. *Amana Refrigeration, Inc., supra* note 2, 295 F.2d at 378, where the court concluded in a case brought under Section 2(a) and 3 of the Clayton Act that the sale of television advertising time involved essentially the sale of a privilege to sponsor a program and advertise.

invoked for many other tangible products. Yet, it seems equally clear that newspaper advertising space can be sold for "*use,* consumption, or resale," measured in terms of "like grade and quality" and priced in a manner that reflects differences in the cost of "manufacture, sale, or delivery." 15 U.S.C. 13(a)(emphasis added).

To put the issue differently, there is nothing inherent in the sale of newspaper advertising space that requires particularized skills or treatment for different customers which would render the application of the Robinson-Patman Act to such transactions especially difficult. Unlike the negotiation of a construction contract, the sale of investment or other professional services, or the provision of transportation, the product being sold here functionally conforms to the statutory framework.

To treat newspaper advertising as a commodity does no violence to the structure of the Act, nor does it open the floodgates for litigation concerning a host of transactions which bear little relationship to the purposes underpinning the statute. To the contrary, we believe our interpretation effectuates the purposes of the Robinson-Patman Act while recognizing the limiting features built into that legislation.[18] We conclude, therefore, that newspaper advertising, despite the attendant service aspects, is essentially a commodity within the meaning of Section 2(a).

It is ordered, That complaint counsel's appeal from the order dismissing count II of the complaint be, and it hereby is, granted.

[18] To the extent that our decision is in any way inconsistent with previous court decisions construing the meaning of the term "commodities," we respectfully decline to follow those holdings. Similarly, although we respect the contrary views expressed earlier by the co-author of the Robinson-Patman Act, we believe greater weight in this instance should be given to the history and purposes of the Act than should be accorded to Representative Patman's statements made after its passage. *See United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 348–49 (1963).

IN THE MATTER OF

DRIVER TRAINING INSTITUTE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9060. Complaint, Oct. 3, 1975 — Decision, July 27, 1978

This consent order, among other things, requires a Brooklyn, N.Y. truck and tractor-trailer training school to cease misrepresenting job opportunities, potential earnings, and employment demands for their graduates; and the effectiveness of their job placement activities. Further, firm is required to make timely, prescribed disclosures regarding cooling-off periods, cancellation rights, and job success of former trainees. Additionally, the order requires that firm establish a $50,000 restitution fund to provide refunds to eligible former students, and maintain a surveillance program designed to ensure proper compliance with the terms of the order.

Appearances

For the Commission: *Alice T. Petizon, Jan F. Constantine* and *Shirley F. Sarna.*

For the respondents: *Spengler, Carson, Gubar, Churchill & Brodsky,* New York City and *Mirabelli & Guld,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Driver Training Institute, Inc., a corporation, Drivers Unlimited, Inc., a corporation, Ran-Lynn Rental and Service Corporation, a corporation, and Herbert Gruen, a/k/a Herbert Gruenstein, individually and as an officer of said corporations, and Sidney Spector, individually and as an officer of Driver Training Institute, Inc., hereinafter referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Driver Training Institute, Inc., Drivers Unlimited, Inc., and Ran-Lynn Rental and Service Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal office and place of business located at 50 Greenpoint Ave., Brooklyn,

New York. The corporate address of Ran-Lynn Rental and Service Corporation is 310 Woods Ave., Oceanside, New York.

Respondent Herbert Gruen, a/k/a Herbert Gruenstein, is an individual and an officer of the corporate respondents. Respondent Sidney Spector is an individual and an officer of Driver Training Institute, Inc. Said individual respondents formulate, direct and control the policies, acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondents.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now and for some time last past have been engaged in the advertising, offering for sale and sale of training courses purporting to prepare graduates thereof for employment as truck or tractor-trailer drivers. Said courses consist of a series of lessons presented during a period of in-residence training at places designated by respondents.

PAR. 3. In the course and conduct of their business and for the purpose of inducing members of the general public to purchase their courses and for the purpose of obtaining leads or prospects for sale of such courses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the training courses by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, including, but not limited to, advertisements inserted in newspapers of interstate circulation, and by means of commercial announcements over television and radio transmitted across state lines, and by means of brochures, pamphlets and other promotional materials disseminated through the United States mail.

Respondents also maintain a training facility in the State of New Jersey and have at various times also maintained a sales office in that state.

Respondents transmit and receive, and cause to be transmitted and received, in the course of advertising, offering for sale, sale and distribution of such training courses, advertising and promotional materials, sales contracts, invoices, billing statements, checks, monies and other business papers and documents, to and from the several places of business operated by the respondents located as aforesaid and to prospective purchasers and purchasers thereof, located in various other States of the United States, other than the state of origination. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in

said training courses in or affectng commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their aforesaid business for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose of inducing members of the general public to purchase such training courses, respondents have made numerous statements and representations, both specific and implied, in newspaper advertisements, television and radio commercials, brochures and other printed materials and directly to said prospective students in the sales presentations made by their sales persons and other representatives, with respect to job opportunities and wages available to students who complete respondents' training courses, the placement assistance furnished to respondents' graduates in obtaining employment, and other matters. The following are typical and illustrative of the aforesaid statements and representations but not all inclusive thereof:

A. *Billboard Advertisements*

Big Steady Money

B. *Newspaper Advertisements*

The trucking industry NEEDS YOU. . .EARN BIG MONEY.

C. *Statements from Brochures*

No matter what their age, experience or background, all who come to DTI have one vital goal in common:

THE NEED
TO MAKE MORE
MONEY

. . .the industry's demand for professionally trained drivers continues to increase.

In general, trucking is one of the most highly unionized industries in the country. This is reflected in pay scales and job security for professionally trained drivers.

At this time, tractor-trailer drivers are in demand and earn the highest pay.

Demand is high and pay and job security are generally good in other trucking categories as well.

While DTI's primary function is professional training, we do offer effective job placement assistance to our graduates.

Each of these classifications (tractor-trailer; bus operator; large truck; small and medium trucks) has its own potential for a steady job at good pay.

DTI job placement

Job placement is part of the DTI service to graduates. This includes professional job counseling for all who complete their courses.

Although DTI cannot guarantee a job, it is a fact that a high percentage of our graduates have been placed through our efforts.

This is not surprising, because DTI's recognition in the industry as a truly fine training school for professional drivers helps to bring employers and our graduates together.

In earning the coveted DTI diploma-a valuable asset-you will be providing yourself with ready recognition in the industry as a safe, efficient and professional driver.

D. *Television Advertisements*

1

How would you like to make more than a good living? It's easy as a professional tractor-trailer driver. Let Driver Training Institute, one of America's oldest and largest licensed trucking schools show you how. You can keep your present job while you train. . .No previous trucking experience or high school diploma necessary. . .You get full job security in this highly unionized industry where no machine can replace you. Let Driver Training Institute help place you in the thousands of high paying jobs now waiting for you as a tractor-trailer driver. . .

2

Drive a tractor-trailer. These men do. This man now earns $250 a week and more. This man earns over $300 a week. They both have one thing in common. . .the need to make more money. If you want to make big money too, then call Driver Training Institute now. . .Act now. While there are still hundreds of high paying union jobs open. . .

3

Trailer drivers are in demand and do earn good money. The Driving Training Institute will train you in a very short time even while you're on your present job at their New York and Central New Jersey training centers. . .

4

FRIEND: Joey! I hear it's your last day on the job.
JOEY: Yeah! I start Monday as a tractor-trailer driver. Twice the money too.
FRIEND: How'd you swing that?
JOEY: With a course at DTI. Helped me get the job. Pretty good for a high school dropout, ha?. . .
ANNCR: You can train at the Driver Training Institutes in New York and Central New Jersey training centers. Better money and a brighter future in the highly unionized teamster industry. . .

E. *Oral Statements by Sales Representatives*

(a) There are a substantial number of positions as truck and tractor-trailer drivers readily available to respondents' graduates.

(b) Respondents' graduates experience little or no difficulty in obtaining employment as truck and tractor-trailer drivers.

(c) A substantial number or percentage of respondents' graduates earn salaries of approximately $250 per week.

PAR. 5. By and through the use of the aforementioned statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents represent and have represented, directly or by implication, that:

1. There is a significant or substantial need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

2. Respondents had a reasonable basis from which to conclude that there is now or will be a significant or substantial need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

3. Thousands of high-paying jobs as truck and tractor-trailer drivers are readily available to graduates of respondents' training courses.

4. Respondents had a reasonable basis from which to conclude that there are thousands of high paying jobs as truck and tractor-trailer drivers readily available to graduates of respondents' training courses.

5. Graduates of respondents' training courses will experience little or no difficulty in securing employment in positions for which they have been trained.

6. The types of jobs available to graduates of respondents' training courses are steady, regular or secure in nature.

7. The types of jobs available to graduates of respondents' training courses generally pay salaries of approximately $250 per week and a substantial number of the graduates of respondents' courses earn $250 per week as truck and tractor-trailer drivers.

8. Respondents had a reasonable basis from which to conclude that a substantial number of graduates of their training courses would obtain jobs that paid approximately $250 per week.

9. Respondents' placement service has been successful and effective in securing employment for all or most of their graduates as truck and tractor-trailer drivers.

10. Experience is not necessary or advantageous for graduates of respondents' courses of training to secure employment in high-paying, steady positions as truck and tractor-trailer drivers.

PAR. 6. In truth and in fact:

1. At the time it was so represented there was not a significant nor substantial need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

2. Respondents had no reasonable basis from which to conclude that there is now or will be a significant or substantial need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

3. Thousands of high-paying jobs as truck and tractor-trailer drivers are not readily available to graduates of respondents' training courses.

4. Respondents had no reasonable basis from which to conclude that there are thousands of high-paying jobs as truck and tractor-trailer drivers readily available to graduates of respondents' training courses.

5. Graduates of respondents' training courses have in many instances experienced substantial difficulty in securing employment in positions for which they have been trained.

6. The types of jobs available to graduates of respondents' courses are often not regular, secure nor steady in nature.

7. When jobs are available to graduates of respondents' training courses, these jobs generally pay salaries which are less than $250 per week and a substantial number of respondents' graduates do not earn salaries of $250 per week as truck and/or tractor-trailer drivers.

8. Respondents had no reasonable basis from which to conclude that a substantial number of graduates of their training courses would obtain jobs that paid approximately $250 per week.

9. In most cases, respondents' placement service has not been successful nor effective in securing employment for their graduates as truck and tractor-trailer drivers.

10. In most instances experience is necessary or advantageous for graduates of respondents' courses of training to secure employment in high-paying, steady positions as truck and tractor-trailer drivers.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof, were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 7. Through the use of the aforesaid advertisements, television commercials, brochures, oral representations and otherwise, respondents have represented, directly or by implication, that there is or will be a significant or substantial need or demand for all or most of respondents' graduates in positions for which respondents train them; that there are thousands of high-paying jobs as truck and tractor-trailer drivers readily available to graduates of respondents' training courses; and that a substantial number of graduates of

respondents' training courses would obtain jobs that paid approximately $250 per week. Respondents had at the time of said representations no reasonable basis adequate to support the representations. Therefore, the aforesaid acts and practices were, and are, unfair acts or practices.

PAR. 8. (a) In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as truck drivers or tractor-trailer drivers without disclosing in advertising or through their sales representatives: (1) the recent percentage of persons who have completed the training course who were able to obtain the employment for which they were trained; (2) the employers that hired any such persons; (3) the initial salary any such persons received; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts by prospective purchasers of respondents' training courses would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment. Thus, respondents have failed to disclose a material fact which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

(b) Respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as truck or tractor-trailer drivers without disclosing in advertising or through their sales representatives that:

1. Many employers of truck and tractor-trailer drivers prescribe a minimum age of twenty-one years of age for drivers;

2. Many employers of truck and tractor-trailer drivers give preferential consideration in hiring to driver-applicants with actual truck or tractor-trailer driving experience. Knowledge of such facts by prospective purchasers of respondents' training courses would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment. Thus, respondents have failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. Through the aforesaid acts and practices, respondents have

induced persons to pay or to contract to pay to respondents substantial sums of money for courses of training which were of little use or value to said persons for the purposes of obtaining employment in the jobs for which respondents provided training. Respondents have received the said sums of money and have failed to offer refunds or to refund said sums of money or to rescind the contractual oblications of said persons.

Therefore, the aforesaid acts and practices, the receipt of and failure to offer to refund or to refund said sums of money, and the failure to rescind said contractrual obligations, were, and are, unfair or deceptive acts or practices.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein respondents have been, and now are, in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of courses covering the same or similar subjects.

PAR. 11. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices and their failure to disclose material facts as aforesaid has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and to induce a substantial number thereof to purchase respondents' training courses by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for the purpose of considering settlement by the entry of a consent order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the

complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondents Drivers Unlimited, Inc., and Ran-Lynn Rental and Service Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their prinicpal office and place of business located at 50 Greenpoint Ave., Brooklyn, New York. Driver Training Institute, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 50 Greenpoint Ave., Brooklyn, New York.

Respondent Herbert Gruen, a/k/a Herbert Gruenstein, is an individual and an officer of the corporate respondents and also does business under the firm name of Driver Training Institute. Said individual respondent formulates, directs and controls the policies, acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Driver Training Institute, Inc., a corporation, Drivers Unlimited, Inc., a corporation, Ran-Lynn Rental and Service Corporation, a corporation, their successors and assigns and their officers, and Herbert Gruen, a/k/a Herbert Gruenstein, individually and as an officer of said corporate respondents and doing business under the firm name of Driver Training Institute, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, franchise or other device in connection with the advertising, promoting,

offering for sale, sale or distribution of courses of study, training or instruction in the field of truck driving or any other subject, trade or vocation in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, orally, visually, in writing or in any other manner, directly or by implication, that:

(a) There is a significant or substantial need or demand of any size or proportion for persons completing any of respondents' courses offered in the field of truck driving or any other field, or otherwise representing that opportunities for employment, or opportunities of any type or number are available to such persons, or that persons completing said courses will or may earn a specified amount of money, or otherwise representing by any means the prospective earnings of such persons, except as hereafter provided in Paragraph 5.

(b) The placement service offered by respondents has been successful in placing respondents' graduates in positions as truck and tractor-trailer drivers; or misrepresenting in any manner the effectiveness or success of respondents' placement service in obtaining employment for graduates of any course of training.

(c) Experience is not required or advantageous for employment as truck and tractor-trailer drivers; or misrepresenting in any manner the qualifications or requirements necessary to obtain employment as a truck or tractor-trailer driver.

2. Misrepresenting orally, visually, in writing or in any other manner, directly or by implication:

(a) The employment prospects of respondents' graduates or the ease with which respondents' graduates will attain employment.

(b) The types of jobs available to respondents' graduates, or that there will be job security or steady employment for respondents' graduates in positions for which respondents train such persons.

3. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any truck or tractor-trailer driver training course offered by respondents, the following information:

(a) The title "IMPORTANT INFORMATION" printed in ten (10) point boldface type across the top of the form.

(b) Paragraphs providing the following information:

(1) Many employers of truck or tractor-trailer drivers prescribe a minimum age of twenty-one (21) years of age for interstate drivers.

(2) Many employers of truck or tractor-trailer drivers give

preferential consideration in hiring to driver-applicants with actual truck or tractor-trailer driving experience.

4. Failing to keep adequate records which may be inspected by Commission staff members upon reasonable notice which substantiate the data and information required to be disclosed by Paragraph 5 of this order and prescribed in Appendix A.

5. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any course of instruction in the field of truck driving or any other subject, trade or vocation offered by respondents, the following information in the format prescribed in Appendix A and for a base period designated as described in Appendix B:

(1) The number and percentage of enrollees who have failed to complete their course of instruction, such percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility;

(2) The placement rate, ratio or percentage for enrollees and graduates, and also the numbers upon which such rates, ratios or percentages are based, such rate or percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility;

(3) The salary range of respondents' graduates as to the same graduates used to compute the placement percentage in (2) above;

(4) A list of firms or employers which are currently hiring graduates of said courses in substantial numbers and in the positions for which such graduates have been trained, and the number of such graduates hired, as to the same graduates used to compute the placement percentage in (2) above.

Provided, however, this paragraph shall be inapplicable to any school newly established by respondents in a metropolitan area or county, whichever is larger, where they previously did not operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for the base period established pursuant to Appendix B as prescribed in this paragraph. However, during such period the following statement, and no other, shall be made in lieu of the Appendix A Disclosure Form required by this paragraph:

DISCLOSURE NOTICE

This school [or course, as the case may be] has not been in operation long enough to indicate, what, if any, actual employment or salary may result upon graduation from this school [course].

6. (a) Contracting for the sale of any course of instruction in the

field of truck driving or any other subject, trade or vocation in the form of a sales contract or any other agreement which does not contain in immediate proximity to the space reserved in the contract for the signature of the prospective enrollee in boldface type of a minimum size of ten (10) points, a statement in the following form:

> You, the prospective enrollee, may cancel this transaction at any time prior to midnight of the seventh business day after the date of this transaction. See attached notice of cancellation form for an explanation of this right.

(b) Failing to furnish each prospective enrollee, at the time he signs the sales contract or otherwise agrees to enroll in a course of instruction in the field of truck driving or any other subject, trade or vocation offered by respondents, a complete form in duplicate, which shall be attached to the contract or agreement, and easily detachable, and which shall contain in ten (10) point boldface type the following information and statements:

NOTICE OF CANCELLATION

(enter date of transaction)
(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN SEVEN (7) BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN (10) BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THIS TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL THIS TRANSACTION YOU MUST RETURN, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY BOOKS OR OTHER MATERIALS PROVIDED TO YOU UNDER THIS CONTRACT OF SALE. THESE MATERIALS MUST BE MAILED OR DELIVERED BY YOU TO *(Address of Seller's place of business)* WITHIN TWENTY (20) DAYS OF THE DATE YOU CANCEL THIS TRANSACTION. IF YOU FAIL TO RETURN THESE MATERIALS, THEN YOU WILL REMAIN LIABLE FOR PAYMENT OF THEIR REASONABLE COSTS.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO *(Name of Seller)*, AT *(Address of seller's place of business)* NOT LATER THAN MIDNIGHT OF *(Date)*.

I HEREBY CANCEL THIS TRANSACTION.

(Buyer's signature) (Date)

(c) Failing to orally inform each prospective enrollee of his right to cancel at the time he signs a contract or agreement for the sale of any course of instruction.

(d) Misrepresenting in any manner the prospective enrollee's right to cancel.

(e) Failing or refusing to honor any valid notice of cancellation by a prospective enrollee and within ten (10) business days after the receipt of such notice, to: (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by respondents; (iii) cancel and return any negotiable instrument executed by the prospective enrollee in connection with the contract or sale.

(f) During the cancellation period described herein, respondents shall not initiate contacts with such contracting persons other than contact permitted by this paragraph, and other than contact no earlier than five (5) days following the signing of the contract by the prospective student, which contact shall be limited solely to determining whether the prospective student has obtained a learners permit.

(g) This paragraph 6 shall not apply to any course of instruction whose purpose is avocational and which does not exceed seven (7) days in duration of less than full-time training and does not cost more than $150.

7. Making any representations of any kind whatsoever, which are not already prescribed by other provisions of this order, in connection with the advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in the field of truck driver training or any other course offered to the public in any field in or affecting commerce, for which respondents have no reasonable basis prior to the making or dissemination thereof.

8. In the event the Commission promulgates a final Trade Regulation Rule on Advertising, Disclosure, Cooling-Off and Refund Requirements Concerning Proprietary Vocational and Home Study Schools, then, upon the effective date of such Rule, such Trade Regulation Rule shall completely supersede and replace the provisions of this order set forth in Part I, Paragraphs 1(a), 4, 5 and 6, provided that if no provision of the Trade Regulation Rule relates in whole or in part to any matter covered by provisions of one of the aforesaid paragraphs of this order, then said provisions of said paragraph shall remain in full force and effect.

II

It is further ordered, That respondents:

(1) Deliver, or cause to be delivered, a copy of this order to all persons who now or in the future become franchisees of respondents for the operation of a vocational school program.

(2) Inform all franchisees that respondents are obligated to terminate those franchisees who continue the acts or practices prohibited by this order.

(3) Institute a program of continuing surveillance to reveal whether the business operations of each of said franchisees conform to the requirements of this order.

(4) Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating a violation of any provision of this order by any of respondents' present or future franchisees, respondents shall within 24 hours notify such franchisee by certified mail, return receipt requested, that such violation of this order has occurred ("Notice"), and that respondents will discontinue dealing with said franchisee upon receipt by respondents of actual knowledge of any further violations of this order by such franchisee. Respondents shall obtain from such franchisee written acknowledgement of receipt of such Notice which acknowledgement shall indicate the date of receipt of such "Notice." Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance and representatives of the Federal Trade Commission) of facts indicating any violations of any provision of this order, following a franchisee's receipt of the aforesaid "Notice," respondents shall permanently terminate such franchisee.

III

It is further ordered, That:

1. For the purposes of Part III of this order, the following definitions shall apply:

(a) The term "Purchasers" shall mean those students who paid all or some portion of their own tuition to respondents and who did not have their tuition paid in full by any federal, state or local government agency or department, or any private business or other organization;

(b) The term "Relevant Time Period" shall mean the period commencing October 1, 1972 and continuing through December 31, 1976.

2. Respondents shall submit to the New York Office of the Federal Trade Commission, within five (5) days after the date this order is served on respondents (hereinafter "date of service"), a notarized affidavit, executed by respondent Herbert Gruen, to the effect that respondents have made or have caused to be made a good faith search of documents that pertain to purchasers of respondents' truck and tractor-trailer training courses of instruction, and that respondents, to the best of their knowledge, have previously or simultaneously with said affidavit submitted to the Commission the names of all such purchasers enrolled in said courses during the relevant time period.

3. Respondents or their designee shall make an inquiry in writing, on the ninetieth (90th) day after the date of service, in the language, manner and form shown in Appendices C and D, by first class mail with the envelope captioned "ADDRESS CORRECTION REQUESTED," accompanied by a self-addressed, postage prepaid envelope, to the home address of each former purchaser of respondents' truck or tractor-trailer courses whose name was submitted by respondents to the Commission. Counsel for respondents shall submit an affidavit of mailing, together with a postal certificate of mailing, to the New York Regional Office of the Federal Trade Commission within ninety-five (95) days after the date of service.

4. With respect to each purchaser whose mailed inquiry is returned undelivered, respondents or their designee shall have a duty to mail on the one hundred and thirtieth (130th) day after the date of service the same inquiry, by first class mail, to such purchaser's business address and to the address of such purchaser's nearest relatives as appear in personal information records, including but not limited to student or placement files, placement records and survey records maintained by respondents. Respondents shall submit to the New York Regional Office of the Federal Trade Commission, on or before the one hundred and thirty-fifth (135th) day after service, a notarized affidavit, executed by respondent Herbert Gruen, to the effect that respondents have made or have caused to be made, a good faith search of such personal information records as pertain to purchasers whose inquiries were returned undelivered, and that inquiries in writing, in the language, manner and form shown in Appendices C and D, were mailed to each such purchaser at his business address and the address of his nearest relative, as appear in his personal information records. Counsel for respondents shall submit an affidavit of mailing, together with a postal certificate of mailing, to the New York Regional Office of the

Federal Trade Commission within one hundred and thirty-five (135) days after the date of service.

5. Respondents shall use the information that they receive from the completed questionnaires solely for purposes of determining the eligibility of Purchasers who attended DTI during the Relevant Time Period for refunds.

6. "Eligible Class Member" means those purchasers who:

(a) Enrolled in respondents' truck and tractor-trailer training courses during the relevant time period; and

(b) (1) Completed respondents' truck and tractor-trailer courses; or

(2) Elected not to complete respondents' truck and tractor-trailer courses because of a lack of job demand or lack of employment qualifications such as minimum age or experience; and

(c) (1) Sought employment as a truck or tractor-trailer driver; or

(2) Elected not to seek employment as a truck or tractor-trailer driver because of a lack of job demand or lack of employment qualifications such as minimum age or experience; and

(d) (1) Did not attain employment as a truck or tractor-trailer driver; or

(2) Worked as a truck or tractor-trailer driver for twenty per cent (20%) of the time or less since terminating respondents' truck and tractor-trailer training courses.

7. Respondents shall make pro rata refund payments to each eligible class member based upon the proportion that total tuitions paid by or for all such eligible class members bear to the total amount available for refunds as provided in Part III of this order, except that eligible class members whose tuition was paid in part by a federal, state or local government agency or department, or by a private business or other organization, shall receive a pro rata refund based only on that amount of the eligible class members' tuition not paid by a federal, state or local government agency or department, a private business or other organization. In no event shall any eligible class member receive an amount greater than the tuition paid by such eligible class member.

8. Respondents shall ultimately provide a sum of no greater than fifty thousand dollars ($50,000) solely to provide refunds under Part III of this order. No charges against this amount shall be made for administrative costs, which shall be absorbed by the respondents.

9. Respondents shall deposit, on or before the tenth business day after the date of service, the sum of fifty thousand dollars ($50,000) into an escrow account at a banking institution to be agreed on between respondents and a member of the New York Office of the Federal Trade Commission. The principal amount of said bank

account shall be available only for the payment of refunds under the provisions of Part III of this order. Withdrawals and orders against this account shall, by agreement, be effective only when countersigned by the individual respondent, together with the Commission's representative at the New York Regional Office of the Federal Trade Commission.

10. Respondent shall submit to the New York Regional Office of the Federal Trade Commission a written request for advice as to whether their determination of who is an eligible class member complies with the terms of Part III of this order within one hundred and eighty (180) days after the date of service. Respondents shall submit simultaneously with their request all Appendix D questionnaires they have received as of the date said request for advice is filed. Respondents shall also, at this time, present any challenges to the factual accuracy of any Appendix D questionnaire, together with substantiating material, if any. The New York Regional Office of the Federal Trade Commission shall make the final determination of who is an eligible class member. The New York Regional Office of the Federal Trade Commission shall render its advice to respondents and return all Appendix D questionnaires to respondent within two hundred and five (205) days after the date of service.

11. On the two hundred and thirtieth (230th) day after the date of service, respondents or their designee shall deliver, or cause to be delivered, a refund check to each eligible class member, determined in accordance with Part III of this order. The amount of the refund check shall be derived in accordance with Part III of this order.

12. Each refund shall be accompanied by a letter in the language, manner and form shown in Appendix E; and a notice in the language, manner and form shown in Appendix F shall be sent by first class mail, with the sender's return address on the face of the envelope, to the last known home address of all persons whose returned questionnaires showed them to be ineligible for a refund pursuant to Part III of this order.

13. Respondents shall, on the two hundred and fifty-fifth (255th) day after the date of service, file with the New York Regional Office of the Federal Trade Commission a report in writing setting forth the manner and form in which they have complied with Part III of this order

14. Respondents shall maintain records and documents which demonstrate that respondents have complied with Part III of this order for two (2) years after the date of service. Respondents shall return all completed Appendix D questionnaires to the New York

Regional Office of the Federal Trade Commission at the end of the two-year period.

15. It is agreed that should any duty required to be performed on a day certain under Part III of this order fall on other than a business day, the parties hereto may perform such duties on the next following business day.

IV

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this part shall not affect any other obligation arising under this order.

V

It is further ordered, That respondents maintain at all times in the future, complete business records relative to the manner and form of their continuing compliance with the above terms and provisions of this order.

VI

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each operating division and to all of respondents' personnel now or hereafter engaged in the offering for sale, or sale of respondents' courses of study, training or instruction in the field of truck driving or any other subject, trade or vocation, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

VII

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or corporations, the creation or

dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

VIII

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order, except as otherwise provided in Part III.

APPENDIX A

(NAME OF SCHOOL)

IMPORTANT INFORMATION FOR PROSPECTIVE STUDENTS

Below is the dropout rate, job placement rate and starting salaries for students in the (name of course) between (date) and (date). Please read this page carefully before you decide whether or not to enroll in this school.

1. Total number of students: (number)
2. Students who failed to complete the course: (number) - (percent)
3. Students (whether graduating or not) who obtained employment as truck or tractor-trailer drivers: (number) - (percent)
4. Graduates who obtained employment as truck or tractor-trailer drivers: (number) - (percent)
5. Starting salaries of students who obtained employment as truck or tractor-trailer drivers
   - Less than $120 per week: (number) - (percent)
   - $120 - $160 per week: (number) - (percent)
   - $161 - $200 per week: (number) - (percent)
   - $201 - $250 per week: (number) - (percent)
   - $251 - $300 per week: (number) - (percent)
   - Over $300 per week: (number) - (percent)
6. Employers hiring graduates from the (name of course):

Names of Employers	*Number of Graduates Hired*

NOTE: In compiling the foregoing data, information was sought from all students (indicated by item 1 above) and responses were received from _____ students.

APPENDIX B

The first Base Period shall be the six (6) month period ending three (3) months prior to the effective date of this Order. Subsequent base periods shall be of six (6) months duration commencing on the next day following the termination of the prior base period. Base Periods shall be numbered consecutively beginning with the first base period (i.e. Base Period #1) as defined above.

The three (3) month period immediately following the close of a base period shall be used by respondents to record and compile the information required by Paragraph 5 and Appendix A. In addition, respondents may not include in the computation of students for the base period any person whose enrollment terminated during the three (3) month recordation period. Such persons will be included in the statistics for the subsequent base period.

On the first business day falling more than three (3) months after the termination of the base period, respondents shall begin dissemination of that base period's statistics as required by this Order. Respondents shall continue to distribute said statistics until the first business day falling three (3) months after the termination of the next base period, at which time dissemination of the next set of base period statistics must begin.

The following example describes how the six (6) month base period and three (3) month recordation period will be utilized by the respondents:

Base Period 1 will cover that period which begins six months and 90 days prior to the effective date of the Order. If the Order is effective October 1, 1977, the base period will encompass the period January 1 to June 30, 1977. Respondents will then have from July 1 to September 30, 1977 to compile the data required by the Order. Respondents will disseminate the gathered data on October 1.

Base Period 2 would begin on July 1 and end December 31. From January 1 to March 31 respondents would compile the data required by the Order. This data is to be disseminated on the first business day after April 1.

APPENDIX C

(Name)
(Address)

Re: Eligibility for partial reimbursement to certain former students of Driver Training Institute.

Dear (Name):

In settlement of a proceeding brought by the United States Federal Trade Commission, Driver Training Institute has agreed to a consent order. Under that order, some students may be eligible for a partial refund of tuition, if they meet certain requirements for eligibility.

The purpose of the enclosed questionnaire is to determine whether or not you are eligible for a partial reimbursement of tuition. Of course, you are under no obligation to send in this questionnaire, but you *must* return this questionnaire if you want to have your eligibility determined.

If you complete and return this questionnaire, the information in it will be used by Driver Training Institute and the Federal Trade Commission solely to determine your eligibility for a refund. (However, disclosure of the information may also be made to a congressman in the event a congressman inquires about the information *at your request.*

You may already have received and sent in other questionnaires to the Federal Trade Commission or Driver Training Institute. These questionnaires were used in preparation for the adjudicative proceeding. Now that this proceeding has been settled, this questionnaire seeks *different* information, information which is necessary to determine your eligibility.

DIRECTIONS: Please mark or fill in the appropriate spaces on the questionnaire enclosed, and return it in the enclosed stamped addressed envelope. It is suggested that you fill out and mail in this questionnaire as soon as possible, but in any event no

later than (date which represents the one hundred and sixtieth day from the date of service). If you should misplace the envelope provided, please mail your questionnaire to the (Name and address of party on return envelope).

You must follow the directions and should answer all questions which apply to you *completely* and *truthfully,* to the best of your knowledge. Questionnaires which are incomplete or improperly filled out could result in the loss of eligibility.

APPENDIX D

ELIGIBILITY QUESTIONNAIRE

RE: Your attendance at Driver Training Institute, Brooklyn, New York.

1. Did you enroll in a truck or tractor-trailer training course at Driver Training Institute (DTI)? (CHECK ONE) YES NO

2. Did you complete the course? (CHECK ONE) YES . (SKIP TO QUESTION 4) NO

3. Please give the *most important* reason why you did *not* complete the course. (MARK ONLY ONE BOX)

a. I took the course for advancement in my job and not for the purpose of seeking a job as a truck or tractor-trailer driver . . .

b. I decided I did not want a job driving a truck or a tractor-trailer . . .

c. I preferred a job in another field (such as a salesman or mechanic) . . .

d. I decided I would not be able to find a job as a truck or tractor-trailer driver because I did not have any truck or tractor-trailer driving experience . . .

e. I decided that I would not be able to find a job as a truck or tractor-trailer driver because of a lack of demand for drivers . . .

f. I decided I would not be able to find a job as a truck or tractor-trailer driver because I was too young . . .

g. I married, started a family or discontinued my training for other personal reasons such as illness or relocation. . .

h. I was drafted or enlisted in the military service. . .

i. I went to college or other schooling. . .

j. Other (PLEASE DESCRIBE). . .

4. Did you make any effort to seek a job as a truck or tractor-trailer driver? (CHECK ONE) YES. (SKIP TO QUESTION 6). . . NO. . .

5. Please give the *most important* reason why you did *not* seek a job as a truck or tractor-trailer driver. (MARK ONLY ONE BOX)

a. I took the course for advancement in my job and not for the purpose of seeking a job as a truck or tractor-trailer driver. . .

b. I decided I did not want a job driving a truck or a tractor-trailer. . .

c. I preferred a job in another field (such as a salesman or mechanic). . .

d. I decided I would not be able to find a job as a truck or tractor-trailer driver because I did not have any truck or tractor-trailer driving experience. . .

e. I decided that I would not be able to find a job as a truck or tractor-trailer driver because of a lack of demand for drivers. . .

f. I decided I would not be able to find a job as a truck or tractor-trailer driver because I was too young. . .

g. I married, started a family or discontinued my training for other personal reasons such as illness or relocation. . .

h. I was drafted or enlisted in the military service. . .

i. I went to college or other schooling. . .
j. Other (PLEASE DESCRIBE). . .

6. Did you ever get a job as a truck or tractor-trailer driver? (CHECK ONE) YES. . . NO. (SKIP TO QUESTION 8). . .

7. Since leaving Driver Training Institute, about how much time have you been employed as a truck or tractor-trailer driver? (CHECK ONE) 20% of the time 80% of the time 50% of the time 100% of the time

8. How much was your tuition AMOUNT $ _____How much of your tuition did you pay? AMOUNT $ _____

9. Did any federal, state or local government agency or department or any private business or other organization pay any of the tuition for the course in which you enrolled? (CHECK ONE) YES NO

10. How much of your tuition has paid by such governmental agency or private business or organization? AMOUNT $ _____

11. Have you ever received a refund of any tuition money from DTI? (CHECK ONE) YES NO

12. How much was the refund? AMOUNT $ _____

13. How old were you when you enrolled in DIT? _____

Please attach to this form copies of any documents which show that you paid an amount of money for any course of instruction offered by Driver Training Institute. If you cannot provide such documents, your eligibility to receive reimbursement will not be affected.

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. §1001.

_____ _____

Signature Date

_____

Print Name Here

APPENDIX E

(Name)
(Address)
Dear (Name):

Pursuant to a consent order issued by the Federal Trade Commission, Driver Training Institute has agreed to make (percentage) per cent refund of tuition payments to certain students who had enrolled in truck and tractor-trailer training courses offered by Driver Training Institute.

The order of the Commission contains the provisions identifying the class of persons eligible for refunds, and the procedures for making refunds. (You may obtain a copy of the order without charge by writing to the Federal Trade Commission, Public Reference Branch, Room 130, Washington, D.C. 20580. Refer to Driver Training Institute, Inc., Docket No. 9060.)

In accordance with the provisions of the order, it has been determined that you are entitled to a refund of $————. A check for this amount is enclosed.

DRIVER TRAINING INSTITUTE

By

Herbert Gruen

APPENDIX F

IMPORTANT NOTICE

Pursuant to an order of the Federal Trade Commission issued on July 25, 1978, Driver Training Institute agreed to make partial reimbursements of tuition to certain students who had enrolled in Driver Training Institute's truck and tractor-trailer training courses. The order of the Commission contains provisions identifying the class of persons eligible for reimbursement and the procedures for making reimbursements.

In accordance with the provisions of the order, it has been determined, based upon your responses to the "Eligibility Questionnaire," that you are not eligible for reimbursement.

The order specified that the class of students entitled to reimbursement was limited to those students who meet *all* of the following tests:

1. Enrolled in Driver Training Institute's courses during the period from October 1, 1972 to December 31, 1976; and

2. Did not have his course tuition paid in full by a federal, state or local government agency or department, or a private business or other organization; and

3. Completed the training course, or elected not to complete the course because of a lack of job demand or a lack of employment qualifications such as minimum age or experience; and

4. Sought employment as a truck or tractor-trailer driver, or elected not to seek employment because of a lack of job demand or lack of employment qualifications such as minimum age or experience; and

5. Did not get a job as a truck or tractor-trailer driver, or was employed as a truck or tractor-trailer driver for 20% or less of the time since leaving DTI.

You may obtain a copy of the order without charge by writing to the Federal Trade Commission, Public Reference Branch, Room 130, Washington, D.C. 20580. Refer to Driver Training Institute, Inc., Docket No. 9060.

IN THE MATTER OF

[16 CFR 461]; CHILDREN'S ADVERTISING. 43 FR 17967 (1978)

TRR No. 215-60. Interlocutory Order, July 31, 1978

This order denies the petition of Chocolate Manufacturers Association for suspension or narrowing of the instant rulemaking proceeding.

TRR NO. 215-60 ORDER DENYING CHOCOLATE MANUFACTURER'S PETITION

The Chocolate Manufacturers Association ("CMA") has petitioned to suspend the rulemaking proceeding, or, in the alternative, to delete the proposals and issues turning on the safety of sugar-containing foods. CMA contends that the issue of sugar safety is properly a matter for the FDA and that the Commission should defer action on this issue pending the outcome of an impending FDA reevaluation of the safety of sugar. This petition has been certified to the Commission by the Presiding Officer. See Order No. 5.

CMA misapprehends the thrust of the Commission's rulemaking proposal. The central issue is whether television advertising directed towards children, including the advertising of products containing sugar, is unfair or deceptive. While issues of the health effects of sugared products will be considered, there will be no attempt made to decide whether sugar, as such, is a safe food or food additive. As petitioner correctly points out, such a determination is the province of the FDA. However, the fact that sugar is currently "generally recognized as safe" ("GRAS") does not mean that it has no adverse impact on health at any level of consumption or regardless of the manner in which it is consumed. To the extent that television advertising affects the consumption pattern of sugar by children, health issues connected with such consumption are properly subject to Commission examination. Similarly, merely because a product is composed entirely of ingredients that are GRAS does not mean that the product cannot be advertised in an unfair or deceptive manner. See, *National Bakers Servs., Inc.* v. *FTC*, 329 F.2d 365 (7th Cir. 1964); *ITT Continental Baking Co.* v. *FTC*, 532 F.2d 207 (2d Cir. 1976).

The Commission clearly has jurisdiction over food advertising, both under its general mandate to prohibit "unfair or deceptive acts or practices," 15 U.S.C. 45(a)(2), and under its specific authority to prohibit false advertising of foods, drugs, and cosmetics, 15 U.S.C. 52. It is also clear that as between the Commission and the FDA, the Commission has principal responsibility over food advertising. See

Memorandum of Understanding Between Federal Trade Commission and the Food and Drug Administration, 36 F.R. 18539, ¶ III. a. (1971). The December 19, 1977, letter from Dr. Kennedy cited by petitioner clearly indicates that the FDA does not believe that the Commission should suspend its proceeding pending an FDA determination on sugar safety. See also Staff Report, p. 159 n. 257. While the Commission will certainly consider any finding that the FDA may eventually make with respect to the issue of sugar safety, it does not believe that further delay on this issue is desirable or necessary, particularly in view of the fact that the GRAS status of sugar will not be determinative of the issues in the instant proceeding.[1] As the court of appeals noted in *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977), "this is an era of overlapping agency jurisdiction under different statutory mandates." Even if the Commission's rulemaking proceeding essentially overlapped with the proposed FDA evaluation of sugar (a contention that the Commission rejects), the Commission has authority to proceed. As the court noted in *Warner-Lambert Co.* v. *FTC*, 361 F. Supp. 948, 953 (D.D.C. 1973):

> In at least three cases, the courts, including this Court, have held that concurrent FDA-FTC proceedings involving the same or similar matters are proper, and that the statutory remedies of the two agencies are cumulative and not mutually exclusive.

Accordingly, the Commission declines to suspend or narrow the instant rulemaking proceeding.

These issues, along with other questions of the jurisdiction and authority of the Commission proposing the rule, were considered by the Commission in its decision to institute this rulemaking proceeding. Such issues are properly the subject of comment in this proceeding and the Commission encourages all interested persons to raise these issues in the proper forum, *i.e.*, as written or oral comments before the presiding officer. The Commission will then review all such comments before it determines what form of rule, if any, to promulgate. Rule 1.14, 16 C.F.R. 1.14.

The Commission notes that the CMA petition was inappropriately filed directly with the Commission. Section 1.13(c) of the Commission's Rules of Practice designates the presiding officer as the Commission official "responsible for the orderly conduct of the rulemaking," vests him with "all powers necessary to that end," including the power "to certify questions to the Commission for its determination." This section clearly establishes the presiding officer

[1] The decision in *Pfizer & Co.*, 66 F.T.C. 1000 (1964), cited by petitioners at p. 6 of its petition, involved a complaint brought only under 15 U.S.C 52–57, and over which the FDA has specifically asserted jurisdiction. Neither situation exists here.

as the appropriate recipient of motions, petitions, and the like filed in this proceeding and the Commission reminds all parties in this proceeding to adhere to this requirement in the future.

Commissioner Pitofsky did not participate.

261 Interlocutory Order

In the Matter of

(16 CFR 461); CHILDREN'S ADVERTISING. 43 FR 17967 (1978)

TRR No. 215–60. Interlocutory Order, July 31, 1978

This order denies various petitions filed by interested persons in the above rulemaking proceeding. The Commission made the following determinations respecting the questions raised in these petitions and motions:

1. Notice of proposed rulemaking is proper and need not contain specific proposed rule;
2. It is unnecessary to require proponents of proposed rule to proceed first;
3. Unlimited cross-examination by interested persons at legislative hearings is not necessary;
4. Schedule of proceedings will not be reviewed at outset;
5. Notice and opportunity to comment need not be given on procedures for conducting proceeding; and
6. Paragraph D(2) of procedures established for proceeding is proper.

Order Denying Various Petitions

By Order of May 19, 1978, the Presiding Officer in TRR No. 215–60, Children's Advertising, certified certain questions to the Commission that were made in response to separate petitions by the Association of National Advertisers, Inc. ("ANA") and the American Association of Advertising Agencies, Inc. ("AAAA"). See Presiding Officer's Order No. 3. Since that time other petitions or motions raising these questions have been filed and the Presiding Officer has similarly certified them to the Commission. See Presiding Officer's Orders Nos. 6, 7, 8, 9, 10, 12, and 13. The Commission's determinations with respect to the questions raised in these petitions and motions are set forth below. Where the issues made by the various petitioners overlap, they are addressed together.[1]

1. The Notice of Proposed Rulemaking is Proper And Need Not Contain a Specific Proposed Rule.

Petitioners argue that the notice of proposed rulemaking, 43 F.R. 17967 (1978), is deficient in that it does not contain a specific rule proposed by the Commission. The argument is made that Section 18(b)(1) of the FTC Act, 15 U.S.C. 57a(b)(1), requires that the notice contain "the proposed rule." In addition, petitioners claim that it is unfair to force them to comment on an ambiguous proposal, because

[1] The petitions of the ANA and the Toy Manufacturers Association raises all six questions that have been certified by the Presiding Officer; AAAA's petition and the Chocolate Manufacturers Association's petitions raise four of these issues (Nos. 1, 3, 5 and 6 addressed below); the Kellogg petitions raise two issues (Nos. 5 and 6); a letter from Irving Scher raises issue No. 5; and the remaining petitions or motions address themselves only to Paragraph D(2)(e) (question No. 6 below).

of the burden created by having to address themselves to each possible remedy proposed. They also claim that the proposal is so broad that it may encroach on the jurisdiction of other agencies (*i.e.*, the FCC and FDA), and that the proposals should be more specific so that any jurisdictional claims can be addressed and resolved at the outset. Finally, it is argued that the "particular" reasons for the proposed rulemaking have not been identified.

Having examined the area of advertising directed toward children and concluded that a potential problem exists that may warrant the promulgation of a trade regulation rule, the Commission has set forth in its notice the reasons for the commencement of the proceeding, listed various potential remedial approaches and identified particular issues for which public comments are invited in order to determine whether a rule in fact is necessary and, if so, what form it should take. The issue raised by the petitioners challenges the adequacy of the notice.

The rulemaking provisions of Section 18 of the FTC Act, as amended by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Act"), 15 U.S.C. 57a(b), require the Commission to follow the procedures of Section 553 of the Administrative Procedure Act (the "notice and comment rulemaking" provided for by 5 U.S.C. 553) plus certain additional procedures.[2] With respect to commencing a rulemaking proceeding, Section 18(b) provides:

> the Commission shall proceed in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule * * *

Combining the requirements of Sections 553(b)(3) and 18(b)(1), the notice of rulemaking must (a) include "either the terms or substance

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[2] Section 553 provides in relevant part:

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> * * * * * * *
>
> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. [5 U.S.C. 553(b) and (c).]

of the proposed rule or a description of the subjects and issues involved," Section 553(b)(3);[3] and (b) state "with particularity the reason for the proposed rule," Section 18(b)(1). The additional requirement added by Section 18(b)(1) is that the *reason* for the proposed rulemaking must be stated in the notice.

Petitioners interpret Section 18(b)(1) to require that a detailed, specific proposed rule, must also be included in the notice. But petitioners are unable to cite any legislative history to support their argument that the type of basic change in the requirements of Section 553 claimed by them was intended by Congress. Where substantial changes from the requirements of Section 553 were imposed — *e.g.,* the requirement of an informal oral hearing with limited rights of cross-examination and the necessity of a detailed statement of basis and purpose — the extensive discussion concerning these requirements in the legislative history makes clear that such changes were intended. In contrast, the Conference Report is silent on this issue (other than merely stating the change);[4] the House Report on an earlier version of the Act commented only that "the Commission would observe the provisions of section 553 of title 5 of the United States Code and would also (1) issue an order of proposed rulemaking stating the reason for the proposed rule with particularity sufficient to allow informed comment* * *." H.R. Rep. No. 93-1107, 93rd Cong., 2d Sess. 46 (1974). Since Section 553 would be satisfied if only the "substance" of a rule is published, it is obvious that the passing use of the phrase "the proposed rule" in the report did not mean that the specific terms of a rule must be included in the notice.

Since the passage of the Act, the Commission has uniformly interpreted Section 18(b)(1), as requiring either the terms or substance of a proposed rule or a description of the subjects and issues involved be included in the notice commencing the proceeding. Rule 1.11, 16 C.F.R. 1.11, promulgated in 40 R.R. 33966 (Aug. 13, 1975), provides:

> The initial notice shall include: (a) the terms or substance of the proposed rule or a description of the subjects and issues involved; * * * (c) a statement describing with particularity the reason for the rule* * *.[5]

This interpretation is also supported by the regulations promulgated by EPA under the Toxic Substances Control Act, 15 U.S.C. 2605, a

[3] As set forth in greater detail *infra*, the case law interpreting Section 553(b)(3) clearly establishes the propriety of commencing a rulemaking proceeding without proposing a specific rule, so long as the notice adequately apprises those potentially affected of the nature and subject matter of the proceeding.

[4] See H.R. Rep. No. 1606, 93d Cong., 2d Sess. 32 (1974).

[5] On one previous occasion the Commission has initiated a rulemaking proceeding under the Act without publication of the text of a proposed rule. Advertising for Over the Counter Antacids. 43 F.R. 14534 (April 6, 1976).

statute having language identical to Section 18(b)(1) on the issue of what is required in a notice of rulemaking. Rule 750.2(b)(3) (42 F.R. 61259, December 2, 1977) provides that a notice of proposed rulemaking shall contain:

> Either the draft text of the proposed rule (which may include alternative approaches among which a final choice has not yet been made) or a description of the approaches and provisions being considered for inclusion in the rule, or some combination of the above.

The focus of both Section 553 and Section 18(b)(1) is on "informed comment." As the court stated in *Forester* v. *CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977):

> Section 553(b) does not require that interested parties be provided precise notice of each aspect of the regulations eventually adopted. Rather, notice is sufficient if it affords interested parties a reasonable opportunity to participate in the rulemaking process.[6]

The notice of proposed rulemaking published by the Commission allows for such a "reasonable opportunity to participate."

The notice of proposed rulemaking presents various alternatives for dealing with the two major concerns underlying the proceeding: (a) that television advertising of any product to young children may be unfair and deceptive because of their possible inability to comprehend and evaluate such advertising; and (b) that advertising of sugared products directed to children may be unfair and deceptive because of the possible health risks that may result from the consumption of sugar encouraged by such advertising. These two concerns are the particular reasons for the proposed rulemaking and are clearly identified. Specific remedial approaches are suggested and the Commission has invited comment on these approaches; sixteen additional issues on which the Commission desires comments are identified. The notice incorporates two outside petitions which prompted the rule as well as a detailed staff report, which is a matter of public record. Specifically, the notice stated that:

> The petitions raise, and the Report discusses, facts which suggest that the televised advertising of any product directed to young children who are too young to understand the selling purpose of, or otherwise comprehend or evaluate, commercials may be unfair and deceptive within the meaning of Section 5 of the Federal Trade Commission Act, requiring appropriate remedy. The Report also discloses facts which

[6] The proposition that Section 553(b) does not require that a precise rule be proposed in the notice commencing the proceeding is well supported by the case law. See, *e.g.*, *Willapoint Oysters, Inc.* v. *Ewing*, 174 F.2d 676, 684 (9th Cir. 1949); *Buckeye Cablevision, Inc.* v. *FCC*, 387 F.2d 220, 226 (D.C. Cir. 1967); *cf. Ethyl Corp.* v. *EPA*, 541 F.2d 1, 48 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976). Indeed, courts have held that even where the proposed notice was technically deficient, actual notice of the issues involved suffices. *Texaco, Inc.* v. *FEA*, 531 F.2d 1071, 1078 (T.E.C.A.), *cert. denied*, 426 U.S. 941 (1976); *Common Carrier Conf. — Irregular Route* v. *United States*, 534 F.2d 981, 982–83 (D.C. Cir. 1976).

suggest that the current televised advertising of sugared products directed to older children may be unfair and deceptive, again requiring appropriate remedy. The staff Report sets forth the facts (Part III), applies the law to the facts (Part IV), examines jurisdictional and constitutional issues (Part V), discusses the advantages and disadvantages of five possible remedies, and recommends adoption of three of the five (Part VI). The Commission has carefully and deliberately considered the staff report and recommendations. Based upon that report, the Commission believes that a comprehensive rulemaking proceeding addressing the problems posed by television advertising to children is necessary and appropriate. [43 F.R. 17969 (1978).]

The notice is sufficient to allow "informed criticism and comments." *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir.) *cert. denied*, 426 U.S. 941 (1976).[7]

2. It is Unnecessary to Require Proponents of Proposed Rule to Proceed First

Petitioners claim that the proponents of the proposed rule have the burden of proof, both under Section 18(e)(3)(A), 15 U.S.C. 57a(e)(3)(A),[8] and, because they view the rule as a form of censorship, under the First Amendment. Such a burden allegedly requires a showing that the advertising to be regulated is deceptive or misleading (and thus not protected by the First Amendment) and that the remedy chosen is the least restrictive means available. Because of this asserted burden of proof, they suggest that proponents of the rule be required to make their presentation first and that opponents of the rule then present their submissions, thus allowing the opponents of the rule to focus their presentation to counter whatever proponents advance.

The argument of petitioners assumes that the rulemaking proceeding is an adversarial proceeding; indeed, the reference to Section 57a(e)(3)(A) concerns judicial review of promulgated rules which, like appeal from any final agency action, is adversarial in nature. The instant proceeding, however, is not an adversary

[7] With respect to jurisdictional issues, the Commission believes that the notice is sufficient to allow jurisdictional challenges to be raised. See, *e.g.*, May 19, 1978, petition by the Chocolate Manufacturing Association (raising claims of encroachment on the FDA's jurisdiction).

[8] Section 18(e)(3)(A) provides:

> Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of title 5, United States Code (taking due account of the rule of prejudicial error), or if-
>
> (A) the court finds that the Commission's action is not supported by substantial evidence in the rulemaking record (as defined in paragraph (1)(B) of this subsection) taken as a whole, or
>
> (B) the court finds that-
>
> (i) a Commission determination under subsection (c) that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or
>
> (ii) a Commission rule or ruling under subsection (c) limiting the petitioner's cross-examination or rebuttal submissions, has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.
>
> The term "evidence", as used in this paragraph means any matter in the rulemaking record.

proceeding, but an attempt by the Commission to receive public comment to aid it in its decisions whether to issue a rule and, if so, what form such a rule should take. There is no "burden of proof" on any of the participants.[9]

Similarly, there is no constitutional requirement of sequential presentations. The rulemaking proceeding does not itself involve any restrictions on advertising; any restrictions will occur only if a rule is promulgated. The Commission is sensitive to the First Amendment issues involved and has explicitly sought comments thereon. See Issue No. 16, 43 F.R. 17970 (1978). Moreover, the Commission declines this invitation to transform this rulemaking proceeding into an adjudicative trial. In the Commission's view, adoption of this proposal would make neither good law nor good policy. As Professor Davis has stated:

> A good deal of experience with trial-type hearings has accumulated since 1958, and all of it seems strongly to confirm the first two sentences of § 6.06 of the Treatise: "A trial is designed for resolving issues of fact, not for determining issues of law, policy, or discretion. In rule making the method of trial has no place except when specific facts are at issue, and even then it should seldom be used when the disputed facts are legislative." *Administrative Law of the Seventies* 222 (1976).

3. Unlimited Cross-Examination by Interested Persons at the Legislative Hearings is Not Necessary.

Petitioners ask that unlimited cross-examination by interested persons be allowed during the legislative hearing in order to identify those issues of material fact that are in dispute. They claim that questioning by the presiding officer is not an adequate substitute, and suggest that a failure to grant such cross-examination is a denial of statutory rights, which may lead to reversal of any resulting rule.[10]

Section 18(c)(1)(B) requires that interested persons be given the opportunity to cross-examine only with respect to disputed issues of material fact and the determination of whether there are such issues is left to the Commission:

> [I]f the Commission determines that there are disputed issues of material fact it is necessary to resolve [an interested person is entitled] to present such rebuttal submissions and to conduct (or have conducted under paragraph (2)(B)) such cross-

[9] Significantly, while Section 556(d) of the APA places the burden of proof on the proponent of a rule in a formal rulemaking proceeding subject to Section 556, 5 U.S.C. 556(d), informal rulemaking proceedings such as the present one under Section 553 and Section 18 of the FTC Act are not subject to Section 556, and neither Section 553 nor Section 18 contains any comparable provision imposing a burden of proof.

[10] The Commission notes that the opportunity for cross-examination is not constitutionally required in rulemaking proceedings. *Compare Bi-Metallic Inv. Co.* v. *State Bd. of Equalization*, 239 U.S. 441 (1915), *with Londoner* v. *Denver*, 210 U.S. 373 (1908). See also *Vermont Yankee Nuclear Power Co.* v. *NRDC*, 98 S.Ct. 1197, 1211 n.16 (1978); *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224, 244–45 (1973).

examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues. [15 U.S.C. 57a(c)(1)(B).]

This right is further limited by the Commission's power under Sections 18(c)(2) to require "that any cross-examination to which a person may be entitled * * * be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact, "and under Section 18(c)(3) to aggregate persons with the same or similar interests for the purpose of cross-examination. [15 U.S.C. 57a(c)(2) and (3).]

The Commission has adopted a procedure for this proceeding whereby ample opportunity is given to interested persons to identify "disputed issues of fact that are material and necessary to resolve within the meaning of Section 18 of the FTC Act." Interested persons are given the opportunity to submit written comments which may suggest such issues; this opportunity is enhanced by the provisions of Paragraph (D)(2)(d) of the procedures, which require detailed information concerning any surveys or studies that are submitted, so that they may be challenged. Oral presentation at the legislative hearing may also be used to demonstrate that such a disputed issue exists.

Although not required by the statute, the Commission has afforded interested persons the opportunity to submit questions to the Presiding Officer, a procedure that, as previously noted, is sufficient even on disputed issues of material fact, 15 U.S.C. 57a(c)(1)(B), (c)(2)(B). There is also an opportunity after the legislative hearing to submit issues to be designated as disputed issues (Paragraph #1) and to participate, with the right of cross-examination, in the adjudicative hearing. Finally, there is a rebuttal period after the disputed issues hearing (Paragraph F). The Commission believes that these procedures are sufficient to identify and resolve disputed issues of material fact, and that cross-examination by interested persons during the legislative hearing is unnecessary and would unduly delay the proceeding.

4. The Schedule of Proceedings will not be Revised at the Outset.

Petitioners suggest four areas where the schedule of proceedings should be changed.

a. Termination of the written comment period coincides with the time to file requests to appear at the legislative hearing.

They suggest that the filing of comments at the very end of the comment period may make it impossible for persons wishing to appear at the hearing to take issue with such comments to file in time.

b. The following time periods are alleged to be too short:

(1) The 30-day interval between the close of the legislative hearing and the deadline for proposing disputed issues;

(2) The 40 days for legislative hearing; and

(3) The three day period between the deadline for any oral rebuttal presentations and the start of the disputed issues hearing.

The schedule announced by the Commission was based on the Commission's experience with past proceedings and the tendency for such proceedings to be subject to a great deal of delay where strict timetables were not established and adhered to. The Commission has been criticized for such delay and the Commission has been exhorted to reduce delays. See, *e.g.*, H.R. Rep. No. 95–472, 95th Cong., 1st Sess. 5 (1977). The scheduling problems suggested by petitioners are based on the assumption that certain conduct may occur. Whether such conduct will in fact occur is a matter of speculation. For example, there may or may not be comments filed at the very end of the comment period, and these may or may not induce persons who would not otherwise be so inclined to seek to appear at the legislative hearing. Similarly, there may or may not be any designated disputed issues of material fact, or rebuttal may be limited to written submissions. Because of the speculative nature of these problems, the Commission declines to change the schedule at this time. This determination does not affect the ability of persons, during the course of the proceeding, to show that the schedule creates hardship for them and request that the schedule be changed by the Presiding Officer. The Commission declines to do so in advance, however.

5. Notice and Opportunity to Comment Need Not Be Given on the Procedures for Conducting the Proceeding

Various challenges are made to the method by which the procedures for the proceeding were adopted. Petitioners claim that the notice and comment provisions of Section 553 were required to be followed. They contend that the exceptions for "procedural" rules do not apply because of the substantial impact on substantive rights, and that the "good cause" exception is similarly inapplicable because no compelling reason for adopting these procedures without notice and comment has been demonstrated.

The procedural format for conducting the rulemaking proceeding carefully preserves all the rights that interested persons are entitled to under Section 18; the proper notice, opportunity for written comments, and the oral hearing with appropriate cross-examination for disputed issues of material fact that are necessary to resolve are all provided. The challenged procedures do not have a substantial impact on the rights of interested persons, and, apart from providing for a more expeditious proceeding, it appears that they will have little effect on the ultimate decision of whether a rule should be promulgated and, if so, the form of such a rule. Thus, the procedures are "rules of agency * * * procedure or practice" and may be issued without notice and comment. 5 U.S.C. 553(b)(A). As the court noted in *Ranger* v. *FCC*, 294 F. 2d 240, 244 (D.C. Cir. 1961): "Of course all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one." See also, *Kessler* v. *FCC*, 326 F.2d 673 (D.C. Cir. 1963); *EEOC* v. *National Cash Register Co.*, 405 F. Supp. 562, 569–72 (N.D. Ga. 1975).[11]

Petitioners also claim that the Commission has failed to demonstrate "good cause" for finding that its existing procedures are "impractical, unnecessary, or contrary to the public interest" as required by Rule 1.20, 16 C.F.R. 1.20. This argument is primarily linked to the claim that Section 553 requires notice and comment and that the "good cause" exception of Section 553(b)(B) is inapplicable. Petitioners recognize that the Commission did give a "brief statement of its reasons for dispensing with any such procedures,"[12] but they take exception to the adequacy of these reasons. They claim that expeditious procedures are not necessary, citing the "ingrained" pattern of sugar consumption, the prolonged study of these issues that has already occurred, and the lengthy schedule established for the proceeding as indicating that there is no "emergency." These arguments, intertwined as they are with the Section 553 claim, fail to distinguish between Rule 1.20 and Section

[11] The procedures for conducting the instant proceeding differ significantly from the cases cited by petitioners where notice and comment were required because the "procedures" had a substantial impact on substantive rights. For example, *Pickus* v. *U.S. Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974), involved regulations that established criteria for parole decisions, greatly narrowed the discretionary power of the Board, and could be expected to result in different parole decisions. *Pharmaceutical Manufacturers Ass'n.* v. *Finch*, 307 F. Supp. 858 (D. Del. 1970) concerned regulations that changed the type of evidence needed to establish the effectiveness of drugs; the regulations specified a much narrower range of acceptable evidence and a large number of existing drugs might have required retesting in order to stay on the market (as drugs not meeting the new regulation were subject to seizure).

[12] This statement appears at 43 F.R. 17968:

> The Commission believes this procedural experiment, which is designed to expedite this proceeding while affording interested persons all of their statutory rights is necessary in view of need to explore expeditiously the health and other issues raised by this proceeding as well as generally to expedite the conduct of Commission rulemaking.

553(b)(B). The good cause finding in Rule 1.20 relates to whether the procedures themselves are impractical, unnecessary, or contrary to the public interest; that of Section 553 relates to the necessity of providing notice and comment. The Commission's interpretation of its own regulation is entitled to great weight. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Power Reactor Dev. Co.* v. *International Elec. Workers,* 367 U.S. 396, 400 (1961); *FCC* v. *Schreiber,* 381 U.S. 279, 290 (1965). Having found that expeditious procedures are desirable, and using its experience with its regular procedures, the Commission is fully justified in concluding that the regular procedures are impractical or contrary to the public interest.

6. Paragraph D(2)(e) of the Procedures Established for this Proceeding Is Proper.

Petitioners claim that the requirement of Paragraph D(2)(e) — that a commenter presenting surveys or studies also produce other surveys or studies relevant to that commenter's presentation and in the person's possession, custody or control — is an unconstitutional abridgement of speech, is overly broad, and imposes an unfair burden on participants, particularly organizations such as trade associations or advertising agencies, which have numerous offices and massive amounts of arguably relevant information. They also complain that the Paragraph does not take into account privileged information or provide for protective orders.

The argument that Paragraph D(2)(e) improperly limits the right of interested persons to participate in the proceeding has been amply answered by the Presiding Officer in Order No. 2:

> It is no more of a "limitation" on participation than the requirement in Notice Section D(1) that any person who appears in the legislative stage may be re-called for cross-examination. 43 Fed. Reg. 17970. To say that either the "Other Information Provision" or the prospect of cross-examination amounts to a limitation on the right to participate would be tantamount to defining participation as a license to make extravagant claims which cannot be exposed by cross-examination or contradicted by data in the possession of the very person who is making the claim. Neither the Administrative Procedure Act, nor the Magnuson-Moss Act, nor the Commission Rules (even the Commission's Rules in formal adjudications) require that an interested person be given an unfettered license to present facts only favorable to one "side" as well as an assurance that no one will discover what that person really knows. [pp. 3–4.]

The Commission notes that a similar provision is contained in FDA's regulations for formal public evidentiary hearings. 21 C.F.R. 12.85(a)(2). That rule provides that the director of the bureau responsible for the matter must submit:

All documents in his files containing factual data and information, whether favorable or unfavorable to his position, which relate to the issues involved in the hearing.

Section 12.85(b) extends this requirement to each participant in the hearing.

The issues of privileged information or protective orders have also been addressed in Order No. 2. In responding to Question No. 5 the Presiding Officer noted (p. 6) that Rule 1.18(b), 16 C.F.R. 1.18(b), provides for *in camera* treatment of documents when good cause is shown; his response to Question No. 6 (p. 7) indicates his willingness to consider questions of privilege. Rather than concluding at the outset that privileged material will be required to be produced and made public, the more appropriate course of action is for Paragraph D(2)(e) to remain in effect and for the Presiding Officer to deal with questions concerning its application as they arise. The Commission agrees with the interpretations that the Presiding Officer has made thus far and believes that he has the authority to deal with additional questions that may arise in applying Paragraph D(2)(e).

The contention that the Commission lacks authority to promulgate Paragraph D(2)(e) because Section 18(c)(2) provides authority only to prescribe such rules "as may tend to avoid unnecessary costs or delay," has been answered in the Presiding Officer's Order No. 3, pp. 2–3. The Commission is in full agreement that Paragraph (D)(2)(e) is authorized both under Section 18(c)(2) and pursuant to the Commission's inherent right to regulate its proceedings. As the Supreme Court recently noted:

[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments. *Vermont Yankee Nuclear Power Corp., supra,* [98 S.Ct. at 1202.]

The Commission notes that many of the petitions which are the subject of this order were inappropriately filed directly with the Commission or the Secretary. Section 1.13(c) of the Commission's Rules of Practice designates the presiding officer as the Commission official "responsible for the orderly conduct of the rulemaking," vests him with "all powers necessary to that end," including the power "to certify questions to the Commission for its determination." This section clearly establishes the presiding officer as the appropriate recipient of motions, petitions, and the like filed in this proceeding and the Commission reminds all parties in this proceeding to adhere to this requirement in the future.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, August 1, 1978

Clarification of Commission's position in adopting after modification of ALJ's protective order.

ORDER

On January 31, 1977, the Commission adopted, with modification, Paragraph 9 of the protective order issued by the administrative law judge, which paragraph had been certified to the Commission. [89 F.T.C. 107]

It has come to the Commission's attention that certain respondents who are appealing a District Court judgment enforcing the subpoenas issued to them in this matter (*FTC* v. *Anderson*, No. 77-1032 (D.C. Cir.)) have raised on appeal an issue concerning the scope of the protective order as adopted by the Commission. The issue, which they did not raise before the Commission or before the District Court, is whether the Commission has committed itself to give ten days' notice before disclosing respondents' "confidential" documents *sua sponte* or in response to requests not explicitly named in the order, such as requests that are not made pursuant to the Freedom of Information Act.

Paragraph 9 of the administrative law judge's protective order originally provided:

> 9. Notwithstanding any of the foregoing provisions, in the event of a Freedom of Information Act request or an official request from any Congressional committee or subcommittee for disclosure of any document designated "Confidential" hereunder or any information contained therein, authorized representatives of the Commission's Office of General Counsel may inspect the document for purposes of advising the Commission on the request and defending the Commission's interests in court. Furthermore, the Commission shall provide the party which supplied a confidential document with ten (10) days' notice prior to releasing the document in response to such a request *or otherwise*. [Emphasis added.]

In modifying Paragraph 9 to provide for qualified notice in the event of certain congressional requests or judicial compulsory process, it was the Commission's intent to affirm and retain the administrative law judge's language providing an unconditional ten days' notice before disclosing documents in response to Freedom of Information

Act requests "or otherwise." In other words, in adopting the order the Commission committed itself, as it has on other occasions,[1] to provide ten days' notice before disclosing confidential documents *sua sponte* or in response to requests that do not come within the specified qualifications as to disclosure in response to congressional and judicial requests.

[1] See, *e.g.*, the protective order issued July 12, 1978, by the Commission in *Tenneco, Inc.*, Dkt. 9097, p. 181 herein.

IN THE MATTER OF

CAPITAL BUILDERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9041. Complaint, July 15, 1975[1] *— Decision, Aug. 8, 1978*

This order, among other things, requires a Charleston, W. Va. home improvements firm to cease misrepresenting or failing to make relevant disclosures regarding prices, interest rates, savings, discounts and financing arrangements. Further, the firm must cease failing to furnish consumers, in connection with the extension of credit, those materials and disclosures required by Federal Reserve System regulations. The company is additionally required to establish a $35,000 escrow account for making restitution to entitled customers, and to effectuate such restitution in a manner prescribed in the order.

Appearances

For the Commission: *Aaron H. Bulloff, Allan M. Huss* and *Sharon J. Devine.*

For the respondent: *Stanley E. Preiser, Preiser & Wilson,* Charleston, W. Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Capital Builders, Inc., a corporation, and Jerome Finn and Richard Landman, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and of the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Capital Builders, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and

[1] Complaint reported as amended by Commission order dated November 18, 1975.

place of business located at 517 Elizabeth St., East, Charleston, West Virginia.

Respondents Jerome Finn and Richard Landman are the principal officers of said corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution of residential aluminum siding and other home improvements to the public and in the installation thereof.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said products, advertising, and promotional material, contracts, and other business papers and documents, to be shipped and transmitted from and to their place of business, located as aforesaid in the State of West Virginia, to their prospective purchasers and to purchasers thereof located in various States of the United States other than the State of West Virginia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase and installation of their home improvement products, respondents have made numerous statements and representations in their promotional material, and through oral statements and representations made by their salesmen or representatives to prospective purchasers, respecting the nature of their offer and its price.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not specifically set out herein, and through oral statements made by their salesmen or representatives, respondents represent, and have represented, directly or by implication, that:

(1) Respondent's products are being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondents' regular selling price.

(2) After the installation of respondents' aluminum siding is

completed, the homes of purchasers will be used for demonstration and advertising purposes by the respondents; and that as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances or discounts.

(3) Purchasers of respondents' products will pay a specified interest rate.

(4) Purchasers of respondents' products will have no liens placed against their property.

(5) Financing of respondents' consumer credit transactions will be through local financing institutions.

PAR. 6. In truth and in fact:

(1) Respondents' products have not been offered for sale at special or reduced prices, and savings have not thereby been afforded purchasers because of reductions from respondents' regular selling price. In fact, respondents do not have regular selling prices, but the prices at which respondents' products are sold vary from customer to customer, depending on the resistance of the prospective purchaser.

(2) Purchasers have not been granted reduced prices, nor have they received allowances or discounts as a result of respondents' claims that the purchasers' property would be used as a display model. Respondents' claim was a representation designed to break down the prospective purchaser's sales resistance, and not to afford the purchaser a reduction in price.

(3) In many instances, purchasers of respondents' products pay interest rates different from the rates represented to them by respondents' salesmen.

(4) Purchasers of respondents' products have liens placed against their property either in the form of a second mortgage evidenced by a trust deed or in the form of a security interest created by operation of state law and perfectable under state law.

(5) In many instances, respondents finance transactions in which they extend credit through financing institutions located outside the State of West Virginia.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were and are false, misleading, and deceptive.

PAR. 7. In the usual course of their business as aforesaid, respondents employ a liquidated damages clause in their contracts, which requires purchasers to pay thirty percent (30%) of the contract price if they cancel the contract at any time before work is started. The amount fixed by this liquidated damages clause is not a reasonable forecast of just compensation for the harm that would be caused by a breach of the contract, or the harm that would be caused

by a breach of the contract is not one that is incapable of, or is very difficult of, accurate estimation. As such, the liquidated damages clause serves as a penalty to the purchaser or attempts to impose a penalty on the purchaser, and, accordingly, is an unfair act or practice.

PAR. 8. In the conduct of their aforesaid business, at all times mentioned herein, respondents have been in substantial competition, in or affecting commerce, with corporations, firms, and individuals in the sale of aluminum siding and other home improvement products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, acts, and practices, has had, and now has, the capacity and tendency to lead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 11. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend, and for some time in the past have regularly extended, consumer credit, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 12. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business, and in connection with their credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, have caused, and are now causing, customers to execute a document entitled "Contract," a retail installment contract, for the purchase and installation of residential aluminum

siding. Subsequently, at the time of or after installation, after the credit transaction for the installation of the siding is consummated, respondents have their customers execute a document entitled "Contract and Disclosures." Only the document entitled "Contract and Disclosures" contains the consumer credit cost disclosures required by Regulation Z.

Therefore, respondents have failed to make the consumer credit cost disclosures required by Section 226.8 of Regulation Z before the transaction is consummated, as required by Section 226.8(a) of the Regulation.

PAR. 13. By and through the use of respondents' contract to perform home improvements, a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the respondents' customers. Respondents' retention or acquisition of such security interest in said real property thereby entitles their credit customers to be given the right to rescind their transactions until midnight of the third business day following the consummation of the transaction or the date of delivery of all the disclosures in the manner and form required by Regulation Z, whichever is later, as required by Section 226.9(a) of Regulation Z.

Having consummated a rescindable consumer credit transaction, respondents or their representatives have, in many instances, initiated installation of the home improvements, and, subsequently, respondents have delivered or caused to be delivered to thier customers a written notice of the customers' right to rescind, which notice is ante-dated to the date of consummation of the contract.

By and through their actions as alleged above, respondents have:

(1) Failed to give notice to the customer of his right to rescind the credit transaction by furnishing him with two copies of the "notice to customers required by federal law," set forth in Section 226.9(b) of Regulation Z, as required by Section 226.9(b) of Regulation Z.

(2) Failed to delay the making of any physical change in the property of the customer until after the rescission period has expired, as required by Section 226.9(c)(2) of Regulation Z.

(3) Failed to delay performance of any work or service for the customer until after the rescission period has expired, as required by Section 226.9(c)(3) of Regulation Z.

(4) Failed to delay the making of deliveries to the residence of the customer until after the rescission period has expired, as required by Section 226.9(c)(4) of Regulation Z.

(5) Failed to provide customers with two copies of the "effect of

rescission," set forth in Section 226.9(d) of Regulation Z, in the manner and form prescribed by Section 226.9(b) of Regulation Z.

PAR. 14. Having consummated a rescindable consumer credit transaction, as alleged in Paragraph Thirteen above, respondents include the following language in the contract:

Owner agrees that in event of cancellation of this contract before work is started, owner shall pay contractor thirty percent (30%) of the contract price as liquidated damages for the breach.

By and through the use of this quoted language, respondents have:

(1) Represented, directly or by implication, that customers will or may be liable for damages, penalties, or any other charges if they exercise the right to rescind provided by Section 226.9 of Regulation Z, contrary to the provisions of Section 226.9(d) of Regulation Z.

(2) Supplied additional information, not required by Regulation Z, which is stated so as to mislead or confuse the customer concerning his right to rescind the credit transaction, in violation of Section 226.6(c) of Regulation Z.

PAR. 15. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the Truth in Lending Act, and the implementing regulations promulgated thereunder, and the respondents having been served with a copy of that complaint, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint as issued herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and stipulations of fact, and conclusions of law, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period

of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following findings of fact, conclusions of law, and order:

I

JURISDICTIONAL FINDINGS

1. Respondent Capital Builders, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its former office and principal place of business located at 1105 Main St., in the City of Charleston, State of West Virginia.

Respondents Jerome Finn and Richard Landman are the principal officers of said corporation. They formulate, direct, and control the policies, acts, and practices of said corporation, and their addresses are the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

FINDINGS OF FACT

1. Jerome Finn is president of Capital Builders, Inc. (hereinafter "Capital").

2. Richard Landman is vice-president and treasurer of Capital. Jerome Finn and Richard Landman are the sole officers of Capital.

3. As the officers and directors of Capital, Jerome Finn and Richard Landman formulate, direct, and control the acts and practices of Capital and its employees, and formulate and direct the acts and practices of its agents.

4. Capital Builders, Inc., by its agents or employees, entered into transactions with various customers for the purchase of home improvements.

5. Purchases of respondents' home improvements were financed by at least eight lending institutions, including Kanawha Banking and Trust, Charleston National Bank, Kanawha Valley Bank, North American Acceptance Corporation, F.B.S. Financial, Inc., and General Electric Credit Corporation.

6. Stipulations 7 through 27 relate to purchases of respondents' home improvements financed by Kanawha Banking and Trust, Charleston National Bank, and Kanawha Valley Bank, all located in Charleston, West Virginia, for the period July 1, 1973 to October 1, 1975, inclusive (hereinafter referred to as "financing bank").

7. In many instances, customers of Capital were solicited by telephone and subsequently by a salesman representing Capital, and when the customer agreed to purchase home improvements from Capital, a "short form" contract for the purchase was executed by and between the customer and Capital.

8. In many instances the salesman obtained financial information at the time the customer signed a "short form" contract with Capital. This financial information included information regarding outstanding debts, employment, income, and ownership of the real property to be improved.

9. In many instances prior to the time the customer signed the "short form" contract with Capital, the salesman informed the customer of one or more specific finance terms, including the amount financed, the period of repayment, the amount of monthly payment, and the interest rate.

10. In many instances it was understood by both the customer and the salesman for Capital that the "short form" contract was to be financed and that Capital would arrange the financing.

11. This "short form" contract did not contain any disclosure of consumer credit information, including the period of repayment, the amount of monthly payment, the annual percentage rate, or the finance charge, nor was a "Notice to the Customer" as set forth in Section 226.9(b) of Regulation Z (hereinafter "Notice to the Customer"), provided to or left with the customer.

12. In some instances, after execution of the "short form" contract, Capital obtained and paid for building permits and/or property descriptions.

13. Capital's usual practice was to have its salesmen transmit the customer's financial information to Capital's office personnel, who, in turn, forwarded this financial information, as well as the amount financed and the number of payments, to an employee of the installment loan department of the financing bank.

14. In each transaction, the amount of finance charge, amount of each monthly payment, deferred payment price and annual percentage rate were determined by an employee or agent of Capital from instructions and charts provided by the financing bank.

15. The financing bank approved or disapproved the financing of the transaction, and so notified Capital's office personnel.

16. After approval of financing of the transaction by the financing bank, and after execution of the "short form" contract by and between the customer and Capital, Capital contracted for the performance of its obligations with various subcontractors.

17. These subcontractors in fact performed the obligations of Capital under the contract, and were paid therefor by Capital.

18. The financing bank's procedures required Capital to furnish the bank with a note payable to Capital, a Contract and Disclosure Statement ("long form" contract), and a "Notice to the Customer," each signed by the customer. However, in most instances, the Kanawha Valley Bank required the customer to furnish Kanawha Valley Bank with a notice and disclosure form on forms provided by Kanawha Valley Bank, and utilized these forms in lieu of the long form contract and note provided by Capital. In these latter instances, the note and disclosure was mailed by Kanawha Valley Bank directly to the customer, and returned directly to Kanawha Valley Bank. In some instances, the financing bank required the customer to execute a deed of trust to secure the transaction.

19. The financing bank's procedures also required that the aforementioned documents be completed by Captial on forms provided or approved by the financing bank.

20. Capital's agent or employee, who in some instances was not the original salesman, returned to the customer's home to complete and obtain the customer's signature on the above-required documents, except in those instances when Kanawha Valley Bank provided the customer with its forms directly.

21. In many instances, work on the property had already commenced and had been completed at the time of this second visit, or when the note and second contract were provided to the customer.

22. At this second visit, Capital's agent or employee obtained the customer's signature on the note, Contract and Disclosure Statement ("long form" contract), and the "Notice to the Customer." In most instances, Capital's agent or employee dated these documents with the date that the customer executed the contract with the salesman for the purchase of home improvements, even though this second visit occurred at a later date.

23. Capital's agent or employee left copies of the notice, "long form" contract, and "Notice to the Customer" with the customer at this second visit.

24. Upon completion of Capital's obligation under the contract, the customer executed a "Property Improvement Completion Certificate" (hereinafter "Completion Certificate") which he gave to Capital, its subcontractor, agent or employee.

25. Except when the customer returned the note directly to Kanawha Valley Bank, respondents negotiated the note to the financing bank and delivered to the financing bank the Contract and

Disclosure Statement ("long form" contract), the "Notice to the Customer," and the "Completion Certificate."

26. After the financing bank received these documents, it disbursed the amount financed directly to Capital, either by check or by direct deposit to an account of Capital.

27. At all times material hereto, Capital and the financing banks were engaged in a regular course of dealing with regard to the financing of home improvement transactions, as herein set forth.

28. Stipulations 29 through 34 relate to purchases of respondents' home improvements financed by North American Acceptance Corporation of Atlanta, Georgia, F.B.S. Financial, Inc. of Cincinnati, Ohio, L & F Title & Mortgage Company of Charleston, West Virginia, and General Electric Credit Corporation of Pikesville, Maryland (hereinafter "finance companies"). L & F Title & Mortgage Company is a division of Capital.

29. In some instances, Capital, its agents or employees, followed the procedures outlined in Stipulations 7 through 14, but the financing bank disapproved the loan.

30. Capital then sought to obtain financing through one of the finance companies enumerated in Stipulation 28.

31. Capital, its agents or employees, followed the procedures enumerated in Stipulations 15 through 22, except the financing institutions were finance companies, and not financing banks.

32. In some instances, Capital's agent or employee did not inform the customer that financing had been obtained through an out-of-state finance company rather than through a local bank.

33. Capital, its agents or employees, followed the procedures enumerated in Stipulations 23 through 26, except the financing institutions were finance companies and not financing banks, and in all cases payment was made to Capital by check issued by the finance company.

34. At all times material hereto, Capital and each finance company were engaged in a regular course of business with regard to the financing of home improvement transactions as herein set forth.

CONCLUSIONS OF LAW

1. Capital Builders, Inc. arranged for the extension of credit within the meaning of Section 226.2(h) of Regulation Z, the implementing regulation promulgated under the Truth in Lending Act.

2. The credit extended by Kanawha Valley Banking and Trust, Charleston National Bank, Kanawha Valley Bank, The Guaranty Bank, Union Federal Savings and Loan, North American Accep-

tance Corporation, F.B.S. Financial, Inc., General Electric Credit Corporation, and L & F Title & Mortgage Company in each transaction described in the foregoing Stipulations of Fact is "consumer credit" as defined by Section 226.2(p) of Regulation Z.

3. Each transaction described in the foregoing Stipulations of Fact constituted a single consumer credit transaction from the bank or finance company to the customer through the instrumentality of Capital Builders, Inc.

4. Each of the consumer credit transactions described in the foregoing Stipulations of Fact is a transaction which gave rise to a right of rescission as set forth in Section 226.9 of Regulation Z.

ORDER

I

It is ordered, That respondents Capital Builders, Inc., a corporation, its successors and assigns, and its officers, and Jerome Finn and Richard Landman, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, distribution, or installation of aluminum siding, storm windows, storm doors, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, orally or in writing, or by any other means, that any price for respondents' products and/or services is a special or reduced price, unless such price constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such products and/or services were sold or offered for sale to the public on a regular basis by respondents in the recent, regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

(2) Representing, directly or by implication, orally or in writing, or by any other means, that the home of any of respondents' customers or prospective customers has been specially selected as a model home to be used, or will be used, as a model home, or otherwise, for advertising, demonstration, or sales purposes, or that such customers will thereby be granted any allowance, discount, or commission; *provided, however,* that nothing in this order shall prohibit respondents from representing, after a contract has been executed between respondents and a purchaser of respondents' products or services, that purchasers or prospective purchasers can earn future compen-

sation by providing the names of prospective purchasers to respondents' personnel connected with the sale of respondents' products or services.

(3) Representing, directly or by implication, orally or in writing, or by any other means, that the purchaser will pay any interest rate other than that which the purchaser will actually pay; *provided, however,* that nothing in this order shall prohibit respondents from stating the lending institution's prevailing rate of finance charge expressed as an annual percentage rate, as "annual percentage rate" is defined in Section 226.2(g) of Regulation Z.

(4) Failing to disclose, clearly and conspicuously, that purchasers will have liens placed against their property, when such is the case.

(5) Failing to disclose, clearly and conspicuously, that financing of credit transactions will not be through local financing institutions, when such is the case. For purposes of this order, local financing institutions shall be deemed to be institutions which have a main office or a branch office within the county or any county adjacent to which the purchaser or prospective purchaser resides.

(6) Using any liquidated damages clause in their contract form.

(7) Failing, for a period of ten years after the effective date of this order, to maintain adequate records:

(a) For a continuing period of three (3) years from the date of transaction which disclose the factual basis for any representations or statements as to special or reduced prices, as to usual and customary retail prices, as to savings afforded to purchasers, and as to similar representations of the type described in Paragraphs Five (1) and (2) of the complaint.

(b) For a continuing period of three (3) years from the date of transaction with regard to each and every contract hereafter entered into between respondents and their customers, which disclose the amount each customer was charged, exclusive of interest or finance charges, for material and labor; and for those contracts involving siding or the installation of siding, or both, the total amount of siding materials and other materials installed or delivered to the customer, the type and grade of said siding and other materials, a description of the installation performed, and the total amount of money paid to salesmen, agents, or representatives for the solicitation of said contracts.

The information prescribed in subparagraph (7) need not be aggregated onto separate documents. Respondents' retention of records of the type prescribed in subparagraph (7) shall be deemed *prima facie* evidence of compliance with subparagraph (7).

(8) Failing to maintain for a continuing period of three (3) years from the date of transaction, all invoices, notices for payment, and all similar documents which respondents receive in the regular course of their business from suppliers, subcontractors, and other persons, and, for a continuing period of three (3) years from the date of transaction, copies of all contracts entered into between respondents and their customers. This provision notwithstanding, respondents shall continue to preserve evidence of compliance with the requirements of Truth in Lending, as required by Section 226.6(i) of Regulation Z.

II

It is further ordered, That respondents Capital Builders, Inc., a corporation, its successors and assigns, and its officers, and Jerome Finn and Richard Landman, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the extension of consumer credit or advertisements to aid, promote, or assist, directly or indirectly, in the extension of consumer credit, as "consumer credit," "credit sale," and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

(1) Failing to make the consumer credit cost disclosures prescribed by Section 226.8 of Regulation Z prior to consummation of the transaction as required by Section 226.8(a) of Regulation Z.

(2) Failing to give notice to the customer of his right to rescind the credit transaction by furnishing him with two copies of the "notice to customers required by federal law," set forth in Section 226.9(b) of Regulation Z, as required by Section 226.9(b) of Regulation Z.

(3) Failing to delay the making of any physical changes in the property of the customer until after the rescission period has expired, as required by Section 226.9(c)(2) of Regulation Z.

(4) Failing to delay performance of any work or service for the customer until after the rescission period has expired, as required by Section 226.9(c)(3) of Regulation Z.

(5) Failing to delay the making of deliveries to the residence of the customer until after the rescission period has expired, if the creditor has retained or will acquire a security interest other than one arising by operation of law, as required by Section 226.9(c)(4) of Regulation Z.

(6) Failing to provide the customer with two copies of the "effect of

rescission" set forth in Section 226.9(d) of Regulation Z, in the manner and form required by Section 226.9(b) of Regulation Z.

(7) Representing, directly or by implication, that customers will or may be liable for damages, penalties, or any other charges in the event they cancel a contract that is rescindable pursuant to Section 226.9 of Regulation Z.

(8) Supplying customers with any additional information, explanations, contract clause, or other statements pertaining to a transaction which mislead or confuse the customers or contradict, obscure, or detract from the disclosures required by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

(9) Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, at the time and in the manner, form, and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

III

It is further ordered, That respondents shall, within ninety (90) days after service of this order, pay a pro rata share of the escrow account established in subparagraph (2) below to all of respondents' customers who are entitled to receive a share, as "entitled customer" is defined in subparagraph (1) below, subject to the monetary limitation in subparagraph (2) below. Respondents shall effectuate such restitution in the following manner:

(1) For purposes of this order, an "entitled customer" is a person who purchased a home improvement from respondents on credit, as "credit" is defined in Section 226.2(q) of Regulation Z, during the period July 1, 1973 to October 1, 1975, and who has not, at the time of the signing of this Agreement, instituted any private legal action against respondents alleging violations of Regulation Z. "Entitled customers" shall not include persons who received disclosure statements used and prepared by creditors other than respondents and mailed by the creditor directly to the customer.

(2) On or before the third day after the date this order becomes final, respondents shall deposit the sum of thirty-five thousand dollars ($35,000) into an escrow account in a lending institution with which respondents have had no prior dealings. The escrow account shall be utilized for the payment of amounts due to such of respondents' customers entitled to restitution. Respondents' liability for restitution pursuant to the terms of this order shall not exceed thirty-five thousand dollars ($35,000). Printing costs, postage costs, reasonable and ordinary secretarial fees (not to exceed $200), and

escrow agent fees may be charged against the escrow account, but no other expenses shall be so charged.

(3) On or before the tenth (10th) day after the date this order becomes final, respondents shall compile a list containing the name and last known address of each entitled customer, as defined herein, and shall send or cause the escrow agent to send to that customer a copy of the letter set forth in subparagraph (4), *infra,* together with an envelope addressed to the escrow agent with postage prepaid.

(4) The letter to be sent to each entitled customer shall be as follows:

Dear Customer:

The Federal Trade Commission has ordered Capital Builders, Inc. to give back approximately $35,000, to be divided among each of its customers who bought a home improvement from Capital between July 1, 1973, and October 1, 1975. Each customer gets an equal share.

The amount of the equal shares will be determined by the number of such customers who sign and send this notice to the independent escrow agent.

To get your share, you must sign and return the bottom part of this letter. It must be postmarked before (month, day, year—fourteen days after mailing). The escrow agent will send you a check. The money will be yours to keep. You must, however, continue your scheduled payments for your home improvement.

Your acceptance of this refund does not affect any rights or obligations you may have under the Truth in Lending Act, nor does it extend any statute of limitations. Capital has made no admission of wrongdoing in this matter.

If you wish to receive this payment, please sign below and return the bottom part of the notice in the enclosed pre-addressed, pre-stamped envelope.

CAPITAL BUILDERS, INC.

(Tear off and return)
The money which the escrow agent will send me should be sent to this address:

SIGN HERE. _____
PRINT YOUR NAME. _____
PRINT YOUR ADDRESS. _____

(5) On or before the thirty-fifth (35th) day after the date this order becomes final, respondents, their agent or the escrow agent shall seek to obtain, for each customer whose letter is returned to respondents undelivered, a current mailing address by the following methods: (1) contacting the holder of the entitled customer's indebtedness; and (2) contacting telephone and utility companies. Respondents, their agent or the escrow agent shall use the address so obtained to comply with subparagraph (3) above, on or before the forty-fifty (45th) day after the date this order becomes final, but not

less than ten (10) days after the date each letter is returned to respondents undelivered.

(6) Respondent shall instruct the escrow agent as follows:

(a) The escrow agent shall receive and keep each signed and returned letter set forth in subparagraph (4) sent to it by each entitled customer.

(b) On the seventieth (70th) day after the date this order becomes final, or on the first business day thereafter if said seventieth (70th) day is not a business day, the escrow agent shall compute the amount to be paid to each entitled customer who has signed and returned the letter set forth in subparagraph (4) to the escrow agent by dividing the sum remaining in the escrow account after payment of the escrow agent's fees and expenses equally among those entitled customers.

(c) By the second business day after computation as provided in subparagraph (6)(b), the escrow agent shall mail a cashier's check for the amount computed in subparagraph (6)(b) to each entitled customer who has signed and returned the letter set forth in subparagraph (4) to the escrow agent of his current address. Said mailing shall be by first-class mail. Enclosed with each check shall be the following letter:

Dear Customer of Capital Builders:

Here is a check for $ _____ , which is your share of the $35,000 being returned, as we told you in our previous letter. This check does not affect your schedule of payments.

_____

(Escrow Agent for Capital Builders)

(d) Any checks which are returned uncashed shall be redeposited in the escrow account.

(e) Upon the ninetieth (90th) day after the date this order becomes final, the escrow agent shall terminate the escrow account, and disburse any monies left therein to respondents.

Respondents' obligation under Paragraph III shall terminate upon the performance of the escrow agent's obligations as set forth in this subparagraph.

IV

It is further ordered, That respondents deliver a copy of this order to all present and future sales personnel whose services are engaged by respondents, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

V

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, voluntary bankruptcy, assignment, the creation or dissolution of subsidiaries, or any other change in the corporation.

VI

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment. In addition, for a period of ten (10) years from the effective date of this order, the respondents shall promptly notify the Commission of each affiliation with a new business or employment. Such notice shall include respondents' current business or employment in which they are engaged, as well as a description of their duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VII

It is further ordered, That respondents shall, within sixty (60) days after the effective date of this order, and within thirty (30) days after the termination of the escrow account, file with the Commission a report in writing setting forth the manner in which they have complied with the provisions of this order, and any future compliance reports in the form and manner which the Commission may order.

IN THE MATTER OF

UNITED BUILDERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9043. Complaint, July 15, 1975 — Decision, Aug. 8, 1978

This order, among other things, requires a Charleston, W. Va. home improvements firm to cease misrepresenting or failing to make relevant disclosures regarding prices, interest rates, savings, discounts and financing arrangements. Further, the firm must cease failing to furnish consumers, in connection with the extension of credit, those materials and disclosures required by Federal Reserve System regulations. The company is additionally required to establish a $17,500 escrow account for making restitution to entitled customers, and to effectuate such restitution in a manner prescribed in the order.

Appearances

For the Commission: *Aaron H. Bulloff, Allan M. Huss, Sharon J. Devine* and *David V. Plottner.*

For the respondent: *Stanley E. Preiser, Preiser & Wilson,* Charleston, W. Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that United Builders, Inc., a corporation, and Marvin Bloom and Paul Denillo, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and of the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent United Builders, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of West Virginia, with its principal office and place of business located at 418 West Washington St., Charleston, West Virginia.

Respondents Marvin Bloom and Paul Denillo are the principal

officers of said corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution of residential aluminum siding and other home improvement products to the public and in the installation thereof.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said products, advertising, and promotional material, contracts, and other business papers and documents to be shipped and transmitted from and to their place of business, located as aforesaid in the State of West Virginia, to their prospective purchasers and to purchasers thereof located in various States of the United States other than the State of West Virginia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase and installation of their home improvement products, respondents have made numerous statements and representations in their promotional material, and through oral statements and representations made by their salesmen or representatives to prospective purchasers, respecting the nature of their offer and its price.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not specifically set out herein, and through oral statements made by their salesmen or representatives, respondents represent, and have represented, directly or by implication, that:

(1) Respondents' products are being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondents' regular selling price.

(2) After the installation of respondents' aluminum siding is completed, the homes of purchasers will be used for demonstration and advertising purposes by the respondents; and that as a result of

allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances or discounts.

(3) Purchasers of respondents' products will pay a specified interest rate.

(4) Purchasers of respondents' products will have no liens placed against their property.

(5) Respondents owned Charleston National Bank and/or Kanawha Valley Bank.

PAR. 6. In truth and in fact:

(1) Respondents' products have not been offered for sale at special or reduced prices, and savings have not thereby been afforded purchasers because of reductions from respondents' regular selling price. In fact, respondents do not have regular selling prices, but the prices at which respondents' products are sold vary from customer to customer, depending on the resistance of the prospective purchaser.

(2) Purchasers have not been granted reduced prices, nor have they received allowances or discounts as a result of respondents' claims that the purchasers' property would be used as a display model. Respondents' claim was a representation designed to break down the prospective purchaser's sales resistance, and not to afford the purchaser a reduction in price.

(3) In many instances, purchasers of respondents' products pay interest rates different from the rates represented to them by respondents' salesmen.

(4) Purchasers of respondents' products have liens placed against their property either in the form of a second mortgage evidenced by a trust deed or in the form of a security interest created by operation of state law and perfectable under state law.

(5) Respondents do not own Charleston National Bank and/or Kanawha Valley Bank.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were and are false, misleading, and deceptive.

PAR. 7. In the usual course of their business as aforesaid, respondents employ a liquidated damages clause in their contracts, which requires purchasers to pay twenty-five percent (25%) of the contract price if they cancel the contract at any time before work is started. The amount fixed by this liquidated damages clause is not a reasonable forecast of just compensation for the harm that would be caused by a breach of the contract, or the harm that would be caused by a breach of the contract is not one that is incapable of, or is very difficult of, accurate estimation. As such, the liquidated damages clause serves as a penalty to the purchaser or attempts to impose a

penalty on the purchaser, and, accordingly, is an unfair act or practice.

PAR. 8. In the conduct of their aforesaid business, at all times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms, and individuals in the sale of aluminum siding and other home improvement products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, acts, and practices, has had, and now has, the capacity and tendency to lead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 11. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend, and for some time in the past have regularly extended, consumer credit, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 12. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business, and in connection with their credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, have caused, and are now causing, customers to execute a document entitled "Contract," a retail installment contract, for the purchase and installation of residential aluminum siding. Subsequently, at the time of or after installation, after the credit transaction for the installation of the siding is consummated, respondents, in certain instances, have their customers execute a document entitled either "Contract and Disclosure" or "Disclosure

Statement for Real Estate Loan." Only the document entitled "Contract and Disclosures" or "Disclosure Statement for Real Estate Loan" contains the consumer credit cost disclosures required by Regulation Z. In certain other instances, respondents themselves fail to secure customers' signatures on disclosure statements in favor of respondents' having banks secure these signatures at the time of or after installation, after the credit transaction is consummated.

Therefore, respondents have failed to make the consumer credit cost disclosures required by Section 226.8 of Regulation Z before the transaction is consummated, as required by Section 226.8(a) of the Regulation.

PAR. 13. By and through the use of respondents' contract to perform home improvements, a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the respondents' customers. Respondents' retention or acquisition of such security interest in said real property thereby entitles their credit customers to be given the right to rescind their transactions until midnight of the third business day following the consummation of the transaction or the date of delivery of all the disclosures in the manner and form required by Regulation Z, whichever is later, as required by Section 226.9(a) of Regulation Z.

Having consummated a rescindable consumer credit transaction, respondents or their representatives have, in many instances, initiated installation of the home improvements, and, subsequently, respondents have delivered or caused to be delivered to their customers a written notice of the customers' right to rescind, which notice is ante-dated to the date of consummation of the contract.

By and through their actions as alleged above, respondents have:

(1) Failed to give notice to the customer of his right to rescind the credit transaction by furnishing him with two copies of the "notice to customers required by federal law," set forth in Section 226.9(b) of Regulation Z, as required by Section 226.9(b) of Regulation Z.

(2) Failed to delay the making of any physical change in the property of the customer until after the rescission period has expired, as required by Section 226.9(c)(2) of Regulation Z.

(3) Failed to delay performance of any work or service for the customer until after the rescission period has expired, as required by Section 226.9(c)(3) of Regulation Z.

(4) Failed to delay the making of deliveries to the residence of the customer until after the rescission period has expired, as required by Section 226.9(c)(4) of Regulation Z.

(5) Failed to provide customers with two copies of the "effect of rescission," set forth in Section 226.9(d) of Regulation Z, in the manner and form prescribed by Section 226.9(b) of Regulation Z.

PAR. 14. Having consummated a rescindable consumer credit transaction, as alleged in Paragraph Thirteen above, respondents include following language in the contract:

In event of cancellation, home owners agree to pay 25% of contract price to contractor for damages for breach of contract.

By and through the use of this quoted language, respondents have:

(1) Represented, directly or by implication, that customers will or may be liable for damages, penalties, or any other charges if they exercise the right to rescind provided by Section 226.9 of Regulation Z, contrary to the provisions of Section 226.9(d) of Regulation Z.

(2) Supplied additional information, not required by Regulation Z, which is stated so as to mislead or confuse the customer concerning his right to rescind the credit transaction, in violation of Section 226.6(c) of Regulation Z.

PAR. 15. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the Truth in Lending Act, and the implementing regulations promulgated thereunder, and the respondents having been served with a copy of that complaint, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint as issued herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and stipulations of fact, and conclusions of law, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period

of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following findings of fact, conclusions of law, and order:

1. Respondent United Builders, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of West Virginia, with its former office and principal place of business located at 418 West Washington St., in the City of Charleston, State of West Virginia.

Respondents Marvin Bloom and Paul Denillo are officers of said corporation. They formulate, direct, and control the policies, acts, and practices of said corporation, and their addresses are the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondents, and the proceeding is in the public interest.

STIPULATIONS OF FACT

1. United Builders, Inc. (hereinafter, United) by its agents or employees, entered into transactions with various customers for the purchase of home improvements.

2. Stipulations 3 through 29 relate to purchases of respondents' home improvements financed by the Kanawha Valley Bank of Charleston, West Virginia, for the period October 1, 1972, to August 31, 1974, inclusive.

3. In those instances in which the transaction was financed by the Kanawha Valley Bank, during the negotiations between the customer and United for the purchase of home improvements it was agreed by the customer and United that United would attempt to secure financing for the transaction through the Kanawha Valley Bank.

4. Financial information was obtained in many cases by a salesman of United from the customer at the time the customer signed a contract with United Builders, Inc. This financial information included information regarding outstanding debts, employment, income, and ownership of the real property to be improved.

5. Prior to the time the customer signed the contract with United, the salesman in many cases informed the customer of one or more specific finance terms, including the period of repayment, the amount financed, the amount of monthly payment, and the interest rate.

6. At the conclusion of the above negotiations between the customer and the salesman of United, a contract for the purchase of

home improvements was executed by and between the customer and United.

7. This contract did not contain any disclosure of consumer credit information, including the period of repayment, the amount of monthly payment, the annual percentage rate, or the finance charge, nor was a "Notice to the Customer" as set forth in Section 226.9(b) of Regulation Z (hereinafter, "Notice to the Customer"), provided to or left with the customer.

8. In some instances, after execution of the contract, United obtained and paid for building permits and descriptions of property.

9. Respondents' usual practice was to have their salesmen transmit the customer's financial information to United's office personnel, who, in turn, forwarded this finance information, including the amount financed and the number of payments, to an employee of the Installment Loan Department of the Kanawha Valley Bank.

10. In each such transaction, the amount of the finance charge, amount of each monthly payment, deferred payment price, and annual percentage rate were determined by the salesman for United in accordance with instructions and charts provided by the Kanawha Valley Bank.

11. Kanawha Valley Bank approved or disapproved the financing of the transaction, and so notified United's office personnel.

12. After execution of the contract by and between the customer and United, and after approval of financing of the transaction by Kanawha Valley Bank, United contracted for the performance of its obligations with various subcontractors.

13. These subcontractors, in fact, performed the obligations of United under the contract, and they were paid therefor by United.

14. After the subcontractor commenced performance under the contract, United, in some instances, advised the Kanawha Valley Bank to transmit to the customer such other documents as were necessary to complete the financing arrangement, if the Kanawha Valley Bank had not yet done so.

15. Kanawha Valley Bank personnel then mailed to the customer a document entitled Installment Note and Disclosure, together with a form letter instructing the customer to sign the original document, to return it to Kanawha Valley Bank, and to retain the duplicate copy.

16. Upon completion of United's obligations under the contract, the customer executed a "Property Improvement Completion Certificate," (hereinafter, "Completion Certificate") which he gave to United, or its subcontractor or other agent or employee.

17. The Installment Note and Disclosure contained the consumer credit cost disclosures pertaining to the financing of the transaction.

18. The Kanawha Valley Bank did not transmit to the customer the "Notice to the Customer" in conjunction with the furnishing of disclosures.

19. United transmitted the executed "Completion Certificate" to Kanawha Valley Bank.

20. Upon receipt of an executed Installment Note and Disclosure from the customer and receipt of an executed "Completion Certificate" from United, Kanawha Valley Bank deposited the amount financed directly to the account of United.

21. In certain instances, the customer and the salesman from United agreed to consolidate certain existing debts of the customer as part of the transaction.

22. When the customer agreed to a debt consolidation, United caused disbursement of funds to the customer to discharge the customer's obligations which were consolidated with the cost of the home improvement.

23. In some instances, Kanawha Valley Bank required a deed of trust to secure the financing for the home improvement.

24. In such instances, Kanawha Valley Bank personnel notified United of this requirement.

25. In such instances, the Kanawha Valley Bank supplied United with a completed deed of trust, a completed real estate disclosure, a completed installment note, and a "Notice to the Customer."

26. United, its agent or employee, in turn, presented the deed of trust, installment note, real estate disclosure, and "Notice to the Customer" to the customer and obtained the customer's signature on each document.

27. Upon the execution of the deed of trust by the customer, his signature was acknowledged by a notary public, who in many instances was an agent or employee of United.

28. Executed deeds of trust, real estate disclosures, installment notes, and signed copies of the "Notice to the Customer" were delivered to Kanawha Valley Bank by United.

29. In such instances, upon receipt of the executed "Completion Certificate," deed of trust, real estate disclosure, installment note, and signed copy of the "Notice to the Customer," the Kanawha Valley Bank deposited the amount financed directly to the account of United.

30. At all times material hereto, United and the Kanawha Valley Bank were engaged in a regular course of dealing as herein set forth with regard to the financing of home improvement transactions.

31. The Kanawha Valley Bank instructed United with regard to the handling of financing of home improvement transactions, and United followed this instruction.

32. Stipulations 32 through 40 relate to transactions financed by the Kanawha Valley Bank for the period September 1, 1974, to October 1, 1975, inclusive.

33. On or about September 1, 1974, as a result of a change in West Virginia consumer protection laws, United entered into a written agreement with the Kanawha Valley Bank for the financing of home improvement transactions.

34. Pursuant to the written agreement between United and the Kanawha Valley Bank, United included consumer credit disclosure information in its contract.

35. United's salesman or agent or employee left copies of the Contract and Disclosure Statement and "Notice to the Customer" with the customer.

36. United negotiated the note to Kanawha Valley Bank and delivered to Kanawha Valley Bank the Contract and Disclosure Statement, the "Notice to the Customer," and the executed "Completion Certificate."

37. In some instances, Kanawha Valley Bank required a deed of trust to secure financing for the home improvement.

38. In such instances, United obtained a deed of trust from the customer and assigned the deed of trust to the Kanawha Valley Bank.

39. Except for the changes enumerated in Stipulations 32 through 38, the procedure used to finance United home improvements transactions with Kanawha Valley Bank was identical to the facts enumerated in Stipulations 3 through 30.

40. In some instances, United may not have followed this procedure.

41. In certain instances, after United attempted financing sales of home improvements through the Kanawha Valley Bank, but was not able to obtain this financing, United then sought to obtain financing through Charleston National Bank or advised the customer to seek financing elsewhere.

42. Stipulations 43 through 63 relate only to purchases of United's home improvements, financed by the Charleston National Bank of Charleston, West Virginia, as described in Stipulation 41, from July 1, 1973, to October 1, 1975, inclusive.

43. In many instances, financial information was obtained by a salesman of United from the customer at the time the customer signed a contract with United. This financial information included

information regarding outstanding debts, employment, income, and ownership of the real property to be improved.

44. Prior to the time the customer signed the contract with United, the salesman informed the customer of one or more specific finance terms, including the period of repayment, the amount financed, the amount of monthly payment, and the interest rate.

45. A contract for the purchase of home improvements was executed by and between the customer and United.

46. In certain instances, this contract did not contain any disclosure of consumer credit information, including the period of repayment, the amount of monthly payment, the annual percentage rate, or the finance charge, nor was a "Notice to the Customer" as set forth in Section 226.9(b) of Regulation Z (herinafter "Notice to the Customer") provided to or left with the customer.

47. In some instances, after execution of the contract, United obtained and paid for building permits.

48. United's usual practice was to have its salesmen transmit the customer's financial information to United's office personnel, who, in turn, forwarded this financial information, as well as the amount financed and the number of payments to an employee of the Installment Loan Department of the Charleston National Bank.

49. In each transaction, the amount of finance charge, amount of each monthly payment, deferred payment price and annual percentage rate were determined by an employee of United from instructions and charts provided by the Charleston National Bank.

50. Charleston National Bank approved or disapproved the financing of the transaction, and so notified United's office personnel.

51. After approval of financing of the transaction by Charleston National Bank, and after execution of the contract by and between the customer and United, United contracted for the performance of its obligations with various subcontractors.

52. These subcontractors, in fact, performed the obligations of United under the contract, and were paid therefor by United.

53. Charleston National Bank's financing procedures required United to furnish the bank with a note payable to United, a Contract and Disclosure Statement, and a "Notice to the Customer," each signed by the customer.

54. Charleston National Bank's procedures also required that the aforementioned documents be completed on forms provided or approved by Charleston National Bank.

55. United's agent or employee, who in most instances was not the original salesman, returned to the customer's home to complete

and obtain the customer's signature on the above required documents.

56. In some instances work on the property had already commenced at the time of this second visit.

57. At this second visit, United's agent or employee obtained the customers' signatures on the note, Contract and Disclosure Statement, and the "Notice to the Customer." In some instances, United's agent or employee dated these documents with the date that the customer executed the contract with the salesman for the purpose of home improvements, even though this second visit occurred at a later date.

58. United's agent or employee left copies of these documents with the customer.

59. Upon completion of United's obligation under the contract, the customer executed a "Property-Improvement Completion Certificate" (hereinafter "Completion Certificate") which he gave to United, its subcontractor, agent or employee.

60. Respondents negotiated the note to Charleston National Bank and delivered to Charleston National Bank the Contract and Disclosure Statement, the "Notice to the Customer," and the "Completion Certificate."

61. After the Charleston National Bank received these documents, it deposited the amount financed directly to the account of United.

62. At all times material hereto, Charleston National Bank did not require a deed of trust as security for any aforementioned extension of credit, nor did it take nor file any such deed of trust.

63. At all times material hereto, United and the Charleston National Bank were engaged in a regular course of dealing with regard to the financing of home improvement transactions, as herein set forth.

CONCLUSIONS OF LAW

1. United Builders, Inc. arranged for the extension of credit within the meaning of Section 226.2(h) of Regulation Z, the implementing regulation promulated under the Truth in Lending Act.

2. The credit extended by Charleston National Bank and the Kanawha Valley Bank in each transaction described in the above Stipulations of Fact is consumer credit as defined by Section 226.2(p) of Regulation Z.

3. Each transaction described in the above Stipulations of Fact

constituted a single consumer credit transaction from the bank to the customer through the instrumentality of United Builders, Inc.

4. Each of the consumer credit transactions described in the above Stipulations of Fact is a transaction which gave rise to a right of rescission as set forth in Section 226.9 of Regulation Z.

ORDER

I

It is ordered, That respondents United Builders, Inc., a corporation, its successors and assigns, and its officers, and Marvin Bloom and Paul Denillo, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, distribution, or installation of aluminum siding, storm windows, storm doors, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, orally or in writing, or by any other means, that any price for respondents' products and/or services is a special or reduced price, unless such price constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such products and/or services were sold or offered for sale to the public on a regular basis by respondents in the recent, regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

(2) Representing, directly or by implication, orally or in writing, or by any other means, that the home of any of respondents' customers or prospective customers has been specially selected as a model home to be used, or will be used, as a model home, or otherwise, for advertising, demonstration, or sales purposes, or that such customers will thereby be granted any allowance, discount, or commission; *provided, however,* that nothing in this order shall prohibit respondents from representing, after a contract has been executed between respondents and a purchaser of respondents' products or services, that purchasers or prospective purchasers can earn future compensation by providing the names of prospective purchasers to respondents' personnel connected with the sale of respondents' products or services.

(3) Representing, directly or by implication, orally or in writing, or by any other means, that the purchaser will pay any interest rate other than that which the purchaser will actually pay; *provided,*

however, that nothing in this order shall prohibit respondents from stating the lending institution's prevailing rate of finance charge expressed as an annual percentage rate, as "annual percentage rate" is defined in Section 226.2(g) of Regulation Z.

(4) Failing to disclose, clearly and conspicuously, that purchasers will have liens placed against their property, when such is the case.

(5) Representing, directly or by implication, orally or in writing, or by any other means, that respondents own, or have any ownership in, any bank, finance company, or any other lending institution.

(6) Using any liquidated damages clause in their contract form.

(7) Failing, for a period of ten years after the effective date of this order, to maintain adequate records:

(a) For a continuing period of three (3) years from the date of transaction which disclose the factual basis for any representations or statements as to special or reduced prices, as to usual and customary retail prices, as to savings afforded to purchasers, and as to similar representations of the type described in Paragraphs Five (1) and (2) of the complaint.

(b) For a continuing period of three (3) years from the date of transaction with regard to each and every contract hereafter entered into between respondents and their customers, which disclose the amount each customer was charged, exclusive of interest or finance charges, for material and labor; and for those contracts involving siding or the installation of siding, or both, the total amount of siding materials and other materials installed or delivered to the customer, the type and grade of said siding and other materials, a description of the installation performed, and the total amount of money paid to salesmen, agents, or representatives for the solicitation of said contracts.

The information prescribed in subparagraph (7) need not be aggregated onto separate documents. Respondents' retention of records of the type prescribed in subparagraph (7) shall be deemed *prima facie* evidence of compliance with subparagraph (7).

(8) Failing to maintain for a continuing period of three (3) years from the date of transaction, all invoices, notices for payment, and all similar documents which respondents receive in the regular course of their business from suppliers, subcontractors, and other persons, and, for a continuing period of three (3) years from the date of transaction, copies of all contracts entered into between respondents and their customers. This provision notwithstanding, respondents shall continue to preserve evidence of compliance with the

requirements of Truth in Lending, as required by Section 226.6(i) of Regulation Z.

II

It is further ordered, That respondents United Builders, Inc., a corporation, its successors and assigns, and its officers, and Marvin Bloom and Paul Denillo, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement or consumer credit sale of home improvement products or services, or any other products or services, as "credit sale" is defined in Section 226.2(t) of Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. Law 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

(1) Failing to make the consumer credit cost disclosures prescribed by Section 226.8 of Regulation Z prior to consummation of the transaction as required by Section 226.8(a) of Regulation Z.

(2) Failing to give notice to the customer of his right to rescind the credit transaction by furnishing him with two copies of the "notice to customers required by federal law," set forth in Section 226.9(b) of Regulation Z, as required by Section 226.9(b) of Regulation Z.

(3) Failing to delay the making of any physical changes in the property of the customer until after the rescission period has expired, as required by Section 226.9(c)(2) of Regulation Z.

(4) Failing to delay performance of any work or service for the customer until after the rescission period has expired, as required by Section 226.9(c)(3) of Regulation Z.

(5) Failing to delay the making of deliveries to the residence of the customer until after the rescission period has expired, if the creditor has retained or will acquire a security interest other than one arising by operation of law, as required by Section 226.9(c)(4) of Regulation Z.

(6) Failing to provide the customer with two copies of the "effect of rescission" set forth in Section 226.9(d) of Regulation Z, in the manner and form required by Section 226.9(b) of Regulation Z.

(7) Representing, directly or by implication, that customers will or may be liable for damages, penalties, or any other charges in the event they cancel a contract that is rescindable pursuant to Section 226.9 of Regulation Z.

(8) Supplying customers with any additional information, explanations, contract clause, or other statements pertaining to a transaction which mislead or confuse the customers or contradict, obscure,

or detract from the disclosures required by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

(9) Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, at the time and in the manner, form, and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

III

It is further ordered, That respondents shall, within ninety (90) days after service of this order, pay a pro rata share of the escrow account established in subparagraph (2) below to all of respondents' customers who are entitled to receive a share, as "entitled customer" is defined in subparagraph (1) below, subject to the monetary limitation in subparagraph (2) below. Respondents shall effectuate such restitution in the following manner:

(1) For purposes of this order, an "entitled customer" is a person who purchased a home improvement from respondents on credit, as "credit" is defined in Section 226.2(q) of Regulation Z, during the period July 1, 1973, to October 1, 1975, and who has not, at the time of the signing of this Agreement, instituted any private legal action against respondents alleging violations of Regulation Z. "Entitled customers" shall not include persons who received disclosure statements used and prepared by creditors other than respondents and mailed by the creditor directly to the customer.

(2) On or before the third day after the date this order becomes final, respondents shall deposit the sum of seventeen thousand five hundred dollars ($17,500) into an escrow account in a lending institution with which respondents have had no prior dealings. The escrow account shall be utilized for the payment of amounts due to such of respondents' customer entitled to restitution. Respondents' liability for restitution pursuant to the terms of this order shall not exceed seventeen thousand five hundred dollars ($17,500). Printing costs, postage costs, reasonable and ordinary secretarial fees (as incurred up to but not to exceed $200), and escrow agent fees may be charged against the escrow account, but no other expenses shall be so charged.

(3) On or before the tenth (10th) day after the date this order becomes final, respondents shall compile a list containing the name and last known address of each entitled customer, as defined herein, and shall send or cause the escrow agent to send to that customer a copy of the letter set forth in subparagraph (4), *infra,* together with an envelope addressed to the escrow agent with postage prepaid.

(4) The letter to be sent to each entitled customer shall be as follows:

Dear Customer:

The Federal Trade Commission has ordered United Builders, Inc. to give back approximately $17,500, to be divided among each of its customers who bought a home improvement from United between July 1, 1973, and October 1, 1975. Each customer gets an equal share.

The amount of the equal shares will be determined by the number of such customers who sign and send this notice to the independent escrow agent.

To get your share, you must sign and return the bottom part of this letter. It must be postmarked before (*month, day, year—fourteen days after mailing*). The escrow agent will send you a check. The money will be yours to keep. You must, however, continue your scheduled payments for your home improvement.

Your acceptance of this refund does not affect any rights or obligations you may have under the Truth in Lending Act, nor does it extend any statute of limitations. United has made no admission of wrongdoing in this matter.

If you wish to receive this payment, please sign below and return the bottom part of the notice in the enclosed pre-addressed, pre-stamped envelope.

UNITED BUILDERS, INC.

(Tear off and return)
The money which the escrow agent will send me should be sent to this address:

SIGN HERE. _____
PRINT YOUR NAME. _____
PRINT YOUR ADDRESS. _____

(5) On or before the thirty-fifth (35th) day after the date this order becomes final, respondents, their agent or the escrow agent shall seek to obtain, for each customer whose letter is returned to respondents undelivered, a current mailing address by the following methods: (1) contacting the holder of the entitled customer's indebtedness; and (2) contacting telephone and utility companies. Respondents, their agent or the escrow agent shall use the address so obtained to comply with subparagraph (3) above, on or before the forty-fifth (45th) day after the date this order becomes final, but not less than ten (10) days after the date each letter is returned to respondents undelivered.

(6) Respondent shall instruct the escrow agent as follows:

(a) The escrow agent shall receive and keep each signed and returned letter set forth in subparagraph (4) sent to it by each entitled customer.

(b) On the seventieth (70th) day after the date this order becomes final, or on the first business day thereafter if said seventieth (70th) day is not a business day, the escrow agent shall compute the amount to be paid to each entitled customer who has signed and returned the letter set forth in subparagraph (4) to the escrow agent

by dividing the sum remaining in the escrow account after payment of the escrow agent's fees and expenses equally among those entitled customers; *provided, however,* that no pro rata share may exceed $1,250.

(c) By the second business day after computation as provided in subparagraph (6)(b), the escrow agent shall mail a cashier's check for the amount computed in subparagraph (6)(b) to each entitled customer who has signed and returned the letter set forth in subparagraph (4) to the escrow agent with his current address. Said mailing shall be by first-class mail. Enclosed with each check shall be the following letter:

Dear Customer of United Builders:

Here is a check for $ _____, which is your share of the $17,500 being returned, as we told you in our previous letter. This check does not affect your schedule of payments.

_____
(Escrow Agent for United Builders)

(d) Any checks which are returned uncashed shall be redeposited in the escrow account.

(e) Upon the ninetieth (90th) day after the date this order becomes final, the escrow agent shall terminate the escrow account, and disburse any monies left therein to respondents.

Respondents' obligation under Paragraph III shall terminate upon the performance of the escrow agent's obligations as set forth in this subparagraph.

IV

It is further ordered, That respondents deliver a copy of this order to all present and future sales personnel whose services are engaged by respondents, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

V

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, voluntary bankruptcy, assignment, the creation or dissolution of subsidiaries, or any other change in the corporation.

VI

It is further ordered, That the individual respondents named

herein promptly notify the Commission of the discontinuance of their present business or employment. In addition, for a period of ten (10) years from the effective date of this order, the respondents shall promptly notify the Commission of each affiliation with a new business or employment. Such notice shall include respondents' current business or employment in which they are engaged, as well as a description of their duties and responsibilities. The expiration of the notice provision of this paragraph shall not effect any other obligation arising under this order.

VII

It is further ordered, That respondents shall, within sixty (60) days after the effective date of this order, and within thirty (30) days after the termination of the escrow account, file with the Commission a report in writing setting forth the manner in which they have complied with the provisions of this order, and any future compliance reports in the form and manner which the Commission may order.

IN THE MATTER OF

COOGA MOOGA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2925. Complaint, Aug. 9, 1978—Decision, Aug. 9, 1978

This consent order, among other things, requires a Los Angeles, Ca. marketer and promoter of Acne-Statin, a product advertised for the treatment of acne, to cease disseminating advertisments which misrepresent, through endorsements or otherwise, the characteristics, performance, efficacy or superiority of its skin products. Additionally, the firm is required to maintain ad substantiation records for a specified period of time; and to pay a pro rata share of any restitution which might be ordered by the Commission or a court.

Appearances

For the Commission: *Mark A. Heller* and *Ira R. Nerken.*
For the respondents: *James J. Cook,* Los Angeles, California.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Cooga Mooga, Inc. (hereinafter "Cooga Mooga"), a corporation, and Charles E. Boone (hereinafter "Boone"), as an individual and corporate officer, hereinafter, at times referred to as respondents, having violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. "Cooga Mooga" is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 9255 Sunset Boulevard, Suite 519, Los Angeles, California.

PAR. 2. "Boone" is an individual and corporate president of "Cooga Mooga." He formulates, directs and controls the acts and practices of "Cooga Mooga," including the acts and practices described herein, and he is the principal beneficiary of the corporation's business. "Boone's" business address is 9255 Sunset Boulevard, Suite 519, Los Angeles, California.

PAR. 3. Respondent "Cooga Mooga" is a privately held corporation which was organized and is maintained for the purpose of promoting and conducting the business interests of "Boone." "Cooga Mooga"

and "Boone" in conjunction with Karr Preventative Medical Products, Inc., a California corporation, Dr. Atida H. Karr, The National Media Group, Inc., a Delaware corporation and Robert J. Marsh have been and now are engaged in the business of marketing and advertising health related products, including but not limited to the product Acne-Statin, a product advertised for the treatment of acne. The above-named parties, in connection with the manufacture and marketing of said product, have disseminated, published and distributed, and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of Acne-Statin for human use. This product, as advertised, is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. "Boone" for his part, aided the promotion of Acne-Statin by providing an endorsement which related directly to the product's efficacy, the medical evaluation of the product and his family's satisfaction with the product. This endorsement appeared in virtually every disseminated advertisement for Acne-Statin. In return for his endorsement "Boone" received a share of the product's sales.

PAR. 5. In the course and conduct of their said business, the respondents have disseminated and caused the dissemination of certain advertisements concerning Acne-Statin through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations and the placement of advertisements through television stations with sufficient power to broadcast across statelines and into the District of Columbia and advertisements in the form of a booklet, entitled "Acne: Its Cause and Its Treatment" which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the product Acne-Statin; and have disseminated and caused the dissemination of advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said products in commerce.

PAR. 6. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive thereof, are the following:

"ACNE? Our girls got lasting help with Acne-Statin"

Pat Boone and his daughter Debbie.

"With four daughters, we've tried the leading acne medications at our house, and nothing ever seemed to work until our girls met a Beverly Hills doctor and got some real help through a product she developed called 'Acne-Statin'."

The doctor explained that a bacteria called "C-Acne" located deep in the pores of the skin breaks the oil in the pores into Fatty Acids. The pores become blocked and irritated, resulting in blemishes, blackheads, whiteheads and pimples.

WHAT MAKES ACNE-STATIN SO DIFFERENT?

The doctor went on to say that many medications only attack acne at the surface level by attempting to dry-up the oil. Usually this is ineffective against Acne, and only irritates, dries and peels the skin. **ACNE-STATIN goes right to the root of the problem.** It liquifies at body temperature and deposits an antibacterial agent that kills bacteria on contact, and keeps on killing bacteria hours after each washing. The photographs below dramatically demonstrate Acne-Statin's continual effectiveness compared to the ineffectiveness of soap.

WHAT ABOUT SENSITIVE SKIN?

Debbie said that even when she leaves it on overnight it-doesn't irritate or dry her skin. Dr. Karr explained that it is hypo-allergenic and that it contains a moisturizer. So it leaves even sensitive skin moist and soft with **NO PEELING**. REGARDLESS OF AGE or sex, Acne-Statin helps control skin irritations from occasional blemishes to chronic acne.

DR. ATIDA KARR's genuine concern for skin care was as impressive to me as her credentials. In addition to being an M.D. she also has an M.S. in Physiology and a Ph.D. in Cellular Physiology and Biochemistry. For five years she was involved in cancer research at the University of Pennsylvania under a federal grant.

Equally impressive were the letters she had received from youth and adults alike who had received significant help with Acne-Statin. **HERE ARE EXCERPTS** from two of those letters. **The first one is from an editor of one of the nation's leading fashion magazines.**

"Thank you for recommending your fabulous product. I have literally tried everything on the market, plus some of my own home remedies and have spent hundreds, in fact probably thousands of dollars on treatments, facials and the like and nothing has ever really cleared up my skin, much less left it in good condition. That's why I can't believe that such a pleasant lotion-like cleanser and treatment like Acne-Statin could work as thoroughly as it did. It really is fantastic. It's the only thing that has ever worked."

"Being 25 and having had occasional acne for the past 10 years, I have tried almost every commercial and prescription product, and the results have varied. Since using your Acne-Statin for the first time I have a clear complexion. As an actress, it is necessary that I have my skin clear. My blemishes are completely gone. Not just on the surface, but all traces of infection have disappeared. My skin has reached a balanced condition."

MONEY BACK IF NOT DELIGHTED

If you are not pleased with the help you get you may return the empty container for a full refund.

ACNE-STATIN IS NOT AVAILABLE IN STORES

But you can order a 30-day four-ounce treatment without a prescription for only $9.50. Order now and you'll receive FREE the booklet entitled "Acne, Its Cause and Its Treatment" by Atida Karr, M.D.

HERE'S HOW TO ORDER

1. **Complete the coupon below. Be sure to mark the number of bottles you wish to order.**
2. **Make out a check or money order for the appropriate amount, or use Master Charge or BankAmericard. Be sure to add 50¢ for postage for each bottle.**
3. **Mail the coupon with payment to: ACNE-STATIN, P.O. BOX 100, BEVERLY HILLS, CALIFORNIA 90213.**

ORDER NOW AND RECEIVE FREE

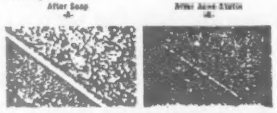
This booklet, "Acne, Its Cause and Its Treatment" by Atida H. Karr, M.D.

SEE THE DIFFERENCE

In these microscopic photographs, each tiny "bubble" is a COLONY of millions of bacteria. Slide A is part of a facial culture taken eight hours after washing with soap. As you can see there are still countless bacterial colonies. Slide B shows a culture of the same facial area a full eight hours after washing with Acne-Statin. Acne-Statin kills bacteria on contact, and keeps on killing bacteria hours after each washing.

After Soap

After Acne Statin



Mail coupon with payment to: MD-577

ACNE-STATIN, P.O. Box 100, Beverly Hills, California 90213

☐ Please Rush ____ 30 day 4-oz. bottles of Acne-Statin.
No.

Enclosed is $10.00 ($9.50 + 50¢ postage & handling for each)

☐ BankAmericard ☐ Check or Money Order ☐ Master Charge

PLEASE PRINT

CREDIT CARD #_____ EXP. DATE_____

NAME_____

ADDRESS_____ APT. NO._____

CITY_____ STATE_____ ZIP_____

SIGNATURE_____
(IF USING CREDIT CARD)

KPMP Products 510 E. Commercial St. Los Angeles, Calif.

Radio TV Reports

41 East 42nd Street New York N.Y. 10017
(212) 697-5100

PRODUCT: * ACNE STATIN * 771887
PROGRAM: NEWS 2/15/77 120 SEC.
PAGE 1 WPIX-TV (NEW YORK) 10:19PM

1. PAT BOONE: Acne is painful, both physically and emotionally. I don't care if you're a teenager or an adult.

2. Acne causes embarassment and anxiety.

3. I'm one of the lucky ones. I never had much of a skin problem.

4. but I do have four daughters We've tried a lot of skin cleansers and medications around our house.

5. And nothing ever really seemed to work, did it, Deb?

6. DEBBIE BOONE: No, not until my sisters and I met a Beverly

7. Hills doctor and got some real help through a product she developed called Acne Statin.

8. PAT: Right. The doctor explained that a bacteria called C-Acne

9. located deep in the pores of the skin, breaks the oil of the pores into fatty acids.

10. The pores become blocked and irritated.

11. This results in blemishes, whiteheads, blackheads, and pimples.

12. DEBBIE: Many medications only attack acne at the surface level by trying to draw out the oil.

13. Usually this doesn't work against acne.

14. It only irritates, dries and peels the skin

15. PAT: Let me show you a photograph.

16. Here are thousands of bacteria colonies still left on facial skin after washing with soap.

Radio TV Reports

41 East 42nd Street New York N.Y. 10017
(212) 697-5100

PRODUCT: ACNE STATIN 771887
PROGRAM: NEWS 2/15/77 120 SEC.
PAGE 2 WPIX-TV (NEW YORK) 10:19PM

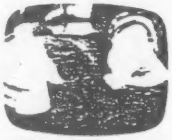
1. Now, here are the same areas eight hours after using Acne Statin.

2. See, Acne Statin goes right to the root of the problem.

3. It liquifies at body temperature so that it can pentrate deep into the pores.

4. And there it deposits an anti-bacterial agent that kills the bacteria responsible for acne,

5. and keeps on killing the bacteria hours after each application.



6. DEBBIE: I like it because it's lotion-like, not greasy, and it goes on clear, leaving my skin moist and soft.

7. PAT: Acne Statin is not available in stores,

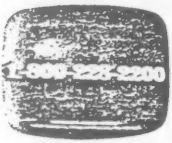
8. but you can order a full 30-day four ounce treatment without prescription.

9. And if you're not completely satisfied, you just return the empty container for a full refund.

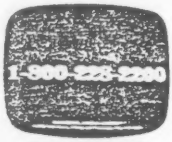
10. Order right away, and you'll also receive a booklet entitled,

11. "Acne: It's Cause And Treatment", by Tina Carr, M.D. Here's how to order.

12. ANNCR: Call toll free, 1-800-228-2200.



13. When your package arrives, pay just $9.50 plus C.O.D. Postage



14. That's 1-800-228-2200. 1-800-228-2200. This is a free call.

See why over 700,000 families have switched to ACNE-STATIN!

"ACNE? Our girls got lasting help with Acne-Statin"

"With four daughters, we've tried the leading acne medications at our house, and nothing ever seemed to work until our girls met a Beverly Hills doctor and got some real help through a product she developed called 'Acne-Statin'."

Pat Boone and his daughter Debby

The doctor explained that a bacteria called "C-Acne" located deep in the pores of the skin breaks the oil in the pores into Fatty Acids. The pores become blocked and irritated, resulting in blemishes, blackheads, whiteheads and pimples.

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HERE'S HOW TO ORDER

1. **Complete the coupon below. Be sure to mark the number of bottles you wish to order.**
2. **Make out a check or money order for the appropriate amount, or use Master Charge or BankAmericard. Be sure to add 50¢ for postage for each bottle.**
3. **Mail the coupon with payment to: ACNE STATIN; P.O. BOX 169; BEVERLY HILLS, CALIFORNIA 90213.**

MONEY BACK IF NOT DELIGHTED

If you are not pleased with the help you get you may return the empty container for a full refund.

ORDER NOW AND RECEIVE FREE

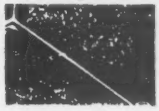
This booklet, *Acne, Its Cause and Its Treatment* by Atida H. Karr, M.D.

P-10-77

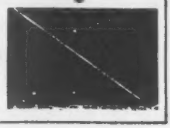
SEE THE DIFFERENCE

In these microscopic photographs, each tiny "bubble" is a COLONY of millions of bacteria. Slide A is part of a facial culture taken eight hours after washing with soap. As you can see there are still countless bacterial colonies. Slide B shows a culture of the same facial area a full eight hours after washing with Acne-Statin. Acne-Statin kills bacteria on contact, and keeps on killing bacteria hours after each washing.

After Soap
-A-



After Acne-Statin
-B-



Mail coupon with payment to
ACNE-STATIN, P.O. Box 169, Beverly Hills, California 90213

☐ Please Rush ___ 30 day 4-oz. bottles of Acne-Statin
@
Enclosed is $10.00 ($8.50 + 50¢ postage & handling for each)

☐ BankAmericard ☐ Check or Money Order ☐ Master Charge

PLEASE PRINT

CREDIT CARD # _____ EXP. DATE _____

NAME _____

ADDRESS _____ APT. NO. _____

CITY _____ STATE _____ ZIP _____

SIGNATURE _____
(IF USING CREDIT CARD)

APMP Products 310 E. Commercial St. Los Angeles, Calif.

PAR. 7. Through the use of said advertisements and others referred to in Paragraphs Five and Six, respondents represented, and now represent, directly or by implication that:

a. Use of Acne-Statin will cure acne regardless of the severity of the condition.

b. Acne-Statin can penetrate the pores of the skin to eliminate the bacteria responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. Acne-Statin can penetrate the pores of the skin to eliminate the fatty acids responsible for pimples, blackheads, whiteheads and other acne blemishes.

d. Acne-Statin is superior to all other acne preparations in the antibacterial treatment of acne.

e. Acne-Statin is superior to soap in the antibacterial treatment of acne.

f. Acne-Statin is a medically and scientifically tested acne treatment.

g. All of "Boone's" daughters used Acne-Statin for the treatment of acne and experienced favorable results.

PAR. 8. In truth and in fact:

a. Use of Acne-Statin will not cure acne.

b. Acne-Statin cannot penetrate the pores of the skin to eliminate the bacteria contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. Acne-Statin cannot penetrate the pores of the skin to eliminate the fatty acids contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

d. Acne-Statin is not superior to prescription and over-the-counter drug preparations which are efficacious in the antibacterial treatment of acne.

e. Neither Acne-Statin nor soap is an effective antibacterial treatment for acne.

f. At the time of the dissemination of the advertisements referred to in Paragraph Five *supra,* Acne-Statin was neither medically nor scientifically tested as an acne treatment.

g. Not all of "Boone's" daughters used Acne-Statin for the treatment of acne or for any other skin condition.

Therefore, the advertisements referred to in Paragraphs Five and Six were and are misleading in material respects and constituted, and now constitute, false advertisements, and the statements and representations set forth in Paragraph Seven were, and are false, misleading or deceptive.

PAR. 9. Furthermore, through the use of the advertisements

referred to in Paragraphs Five and Six, respondents represented, and now represent, directly or by implication that:

a. Use of Acne-Statin by persons with acne will result in skin free of pimples, blackheads, whiteheads and other acne blemishes.

b. Acne-Statin can penetrate the pores of the skin to eliminate the cause of acne.

c. Acne-Statin is superior to all prescription acne preparations for the treatment of acne.

d. Acne-Statin is superior to all other over-the-counter acne preparations for the treatment of acne.

PAR. 10. There existed at the time of the first dissemination of the representations contained in Paragraphs Seven a, b, c, and f and Nine no basis for the making of these representations. Therefore, the making and dissemination of said representations as alleged, constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 11. Through the use of photographs of bacterial colonies, in both the print and television advertisements referred to in Paragraphs Five and Six, respondents represented, and now represent, to consumers that Acne-Statin effectively kills "C-acne," the bacteria responsible for acne.

PAR. 12. In truth and in fact, the slides in the photographs did not contain "C-acne," correctly C-acnes, now generally referred to as P-acnes. They contained staph and other resident bacteria on the facial surface, an environment in which "C-acne" (P-acnes) does not survive. Furthermore, these surface bacteria are neither involved nor in any manner related to the cause of acne.

Therefore, the use of the photographs of bacteria in the advertisements referred to above, constituted, and now constitute, false, misleading or deceptive acts or practices.

PAR. 13. In the course and conduct of its aforesaid business, and at all times mentioned herein, the respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

PAR. 14. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertise-

ments, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Cooga Mooga, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at 9255 Sunset Boulevard, Suite 519, Los Angeles, California.

2. Respondent Charles E. Boone is an individual and corporate officer of Cooga Mooga, Inc., and maintains an office at 9255 Sunset Boulevard, Suite 519, Los Angeles, California.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Cooga Mooga, Inc., a corporation, and Charles E. Boone, individually and as a corporate officer, their successors and assigns, either jointly or individually, and the corporate respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of Acne-Statin will cure acne or any skin condition associated with acne.

2. Represents that Acne-Statin will eliminate or reduce the bacteria responsible for pimples, blackheads, whiteheads, other acne blemishes or any skin condition associated with acne.

3. Represents that Acne-Statin will eliminate the fatty acids responsible for pimples, blackheads, whiteheads, other acne blemishes or any skin condition associated with acne.

4. Represents that Acne-Statin is superior to prescription or over-the-counter antibacterial acne preparations in the treatment of acne.

5. Represents that Acne-Statin is superior to soap in the antibacterial treatment of acne.

6. Represents that either Charles E. Boone or any member of his family used and/or benefited from a product, unless such representation is true.

7. Misrepresents the extent to which any product has been tested or the results of any such test(s).

8. Misrepresents the efficacy, use or the mode of performance of any product where the use or misuse of the product may affect the health or safety of the user.

B. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of Acne-Statin or any other acne product by persons with acne will result in skin free of pimples, blackheads, whiteheads or any other blemishes associated with acne;

2. Represents that Acne-Statin or any other acne product can

eliminate the cause of acne or any skin condition associated with acne;

3. Represents that Acne-Statin or any other acne product is superior to prescription or over-the-counter acne preparations in the treatment of acne or any skin condition associated with acne, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). Competent and reliable scientific or medical evidence shall be defined as evidence in the form of at least two double-blind clinical studies which conform to accepted designs and protocols and are conducted by different persons, independently of each other. Such persons shall be dermatologists who are recognized as specialists in acne and its treatment and who are experienced in conducting such studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any product or refers or relates to any characteristic, property or result of the use of any product, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for such representation(s).

D. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents through an endorsement that use of Acne-Statin or any other acne product by persons with acne will result in skin free of pimples, blackheads, whiteheads or any other blemishes associated with acne;

2. Represents through an endorsement that Acne-Statin or any other acne product can eliminate the cause of acne or any skin condition associated with acne;

3. Represents through an endorsement that Acne-Statin or any other acne product is superior to prescription or over-the-counter acne preparations in the treatment of acne or any skin condition associated with acne;

4. Makes representations through an endorsement, referring or relating to the performance or efficacy of any product or referring or

relating to any characteristics, property or result of the use of any product, unless, prior to the time of the first dissemination of such representation(s), respondents make a reasonable inquiry into the truthfulness of a proposed endorsement and possess and rely upon information from reliable sources independent of the advertiser or other parties with an interest in the product or service which is the subject of the endorsement. For purposes of this provision "information" may include tests or studies in the possession of the advertiser; however, such information must be independently evaluated by reliable sources in order to provide a basis for an endorsement. For products or services not related to health or safety, respondents may rely on the personal experience of the endorser where the evaluation of such products or services, for purposes of any endorsement, requires no professional expertise and such products or services can be reasonably evaluated through lay use. Additionally, if a material connection exists between the endorser and the advertiser or its advertising agency, such connection must be disclosed in the advertisement(s) which contain the endorsement. A "material connection" shall mean, for purposes of this section, any financial interest in the sale of the product or service which is the subject of the endorsement or any familial connection between the endorser and the advertiser or its advertising agency.

II

It is further ordered, That if any party involved in the marketing, sale and/or advertising of Acne-Statin is directed, by a final order of the Commission or a final court decree, to make restitution, then respondents Cooga Mooga, Inc. and/or Boone will contribute their pro rata share to such restitution. Such restitution shall not exceed the total amount of monies paid by the Acne-Statin Joint Venture and/or any party to that venture to Cooga Mooga, Inc. and/or Boone. Furthermore, such restitution shall be limited to no more than twenty-five cents (25¢) for each bottle for which a refund is returned. However, if a partial restitution is ordered, respondents' pro rata share of such restitution shall be the fraction, that is twenty-five cents (25¢) per bottle (the numerator) over the actual sales price of the bottle (the denominator), of the restitution ordered.

Respondent's restitution shall be confined to all purchases made during the advertising campaign which contained "Boone's" endorsement and all reorders made by persons who first purchased Acne-Statin during such campaign or for a period of two (2) months

after the last disseminated advertisement bearing "Boone's" endorsement; *provided, however,* if a United States District Court, pursuant to Section 19 of the Federal Trade Commission Act, 15 U.S.C. 57b, imposes different restitution obligations on Cooga Mooga, Inc. and/or Boone, such obligations shall supersede this order provision. However, if the District Court does not address the respondents as parties, their obligation for restitution shall be defined by this provision.

III

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for one (1) year, file with the Commission a report, in writing, signed by respondent, setting forth in detail the matter and form of its compliance with this order.

It is further ordered, That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB, IC and ID of this order for a period of five (5) years after the first dissemination of any advertisement which relates to that portion of the order. Additionally, such materials shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a demand for such material.

IN THE MATTER OF

COCA-COLA BOTTLING COMPANY OF NEW YORK, INC.

Docket 8992. Interlocutory Order, August 11, 1978

This order grants complaint counsel's motion for reconsideration of a previous Commission denial of their request for an extension of time to file a brief.

ORDER GRANTING MOTION FOR RECONSIDERATION

On August 9, 1978, Complaint Counsel filed a Motion for Reconsideration of Order Denying Request for Eleven Day Extension of Time in Which to File Appeal Brief. Their initial request was denied on the ground that general allegations of burden are not sufficient for an extension of time.

Since complaint counsel's Motion for Reconsideration now cites with specificity their obligations in *Beltone Electronics,* Dkt. 8928 and *Amway Corp.,* Dkt. 9023, that defect is cured. The Commission is aware of the time and work burdens associated with both cases and finds that those obligations are sufficient to justify this limited extension.

It is the Commission's intention that the time limitations set forth in Rule 3.52 are to be maintained. General allegations of burden, without more, will not suffice for an extension of time. Furthermore, specificity alone will not always carry the day. The Commission must be convinced that the burdens which counsel plead are genuine and not brought on by counsel's own lack of diligence. Accordingly,

It is ordered, That complaint counsel's Motion for Reconsideration of Order Denying Request for Eleven Day Extension of Time in Which to File Appeal Brief be, and the same hereby is, granted, and complaint counsel are given to and including August 22, 1978, within which to file an appeal brief.

IN THE MATTER OF

RUBBERMAID INCORPORATED

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8939. Complaint, Sept. 5, 1973 — Modifying Order, Aug. 17, 1978

This order reopens proceedings and modifies the cease and desist order issued on April 13, 1976, 41 FR 20161, 87 F.T.C. 676, by replacing Sections III and IV of the original order. The modification eliminates the requirement to send copies of the order to resellers of firm's products; provides a description of the required notice to be sent to resellers; and places the responsibility of sending such notice to indirect resellers on company's distributors.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On August 7, 1978, respondent and complaint counsel jointly petitioned the Commission to reopen this proceeding to modify Sections III and IV of the order to cease and desist which issued on April 13, 1976, and became final on August 7, 1978.[1]

Section III of the order requires that respondent provide its direct and indirect resellers a copy of the order and a notice describing generally respondent's policy relating to resale prices. Section III further provides that those customers terminated because they failed to comply with any refusal-to-deal provision, will be extended an offer to be reinstated. Finally, Section III provides for the treatment of complaints relating to the provisions of the notice.

Section IV requires respondents, for a period of five years, to send a copy of the order to new resellers to whom it directly sells.

By the proposed modification the order would describe the content of the notice to be sent to resellers and would relieve respondent of the requirement that it send a copy of the order to resellers. The proposed modification would further provide that respondent's distributors, rather than respondent, send notices to indirect resellers.

Because of the repeal of the McGuire Act and the consequent end of state-sanctioned resale price maintenance, several of the provisions in the order and the notice to be sent resellers are no longer relevant and would likely be misunderstood by resellers of respondent's products. As a further result of the abandonment of state-sanctioned resale price maintenance, respondent no longer is required to, nor does it, retain the names of indirect purchasers.

[1] Petitioners also filed on August 8, 1978, a Joint Motion for Suspension of Compliance. This order obviates the necessity for the requested suspension of compliance and therefore the motion is rejected.

These changed conditions of fact and law warrant the modifications requested by respondent and complaint counsel.

Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting for Sections III and IV of the order, the following:

III

It is further ordered, That respondent shall:

1. Within sixty (60) days from the date upon which this order becomes final:

(a) mail or deliver to all resellers which purchase directly from respondent a copy of the notice attached as Exhibit A, and execute an affidavit so stating; and

(b) mail or deliver to each of respondent's wholesalers sufficient additional copies of the notice attached hereto as Exhibit A and request such wholesalers

(i) to mail or deliver these notices to each reseller of respondent's goods with whom they deal; and

(ii) to affirm to respondent in writing that they have made the distribution of these notices as requested.

2. Within sixty (60) days from the date upon which this order becomes final, mail or deliver, and obtain a signed receipt for, a copy of the notice attached as Exhibit A and a written offer of reinstatement, to every reseller who has been terminated by, at the request of, or with the participation of respondent since January 1, 1966, for failure to comply with any refusal to deal provision of his contract, and reinstate forthwith any such reseller who within thirty (30) days thereafter requests reinstatement.

3. Immediately upon receipt, take such action as may be proper to insure correction of any complaints concerning the unavailability of Rubbermaid products to any reseller as a result of such reseller's pricing or customer selection policies or practices and retain such complaints and records of corrective action taken thereon for a period of five (5) years from the date on which each complaint is received. Reports of said complaints and of corrective action taken shall be included in reports to the Commission required by Paragraph V. 1. of this order.

IV

It is further ordered, That respondent shall:

1. Fully acquaint all appropriate present and future personnel with the provisions and the requirements of this order.

2. For a period of five (5) years from the date of this order, mail or deliver a copy of the notice attached as Exhibit B to all new resellers to whom respondent directly sells.

Commissioner Pitofsky did not participate.

EXHIBIT A

TO: All Rubbermaid Wholesalers and Retailers

SUBJECT: Discontinuance of Fair Trade Program

On June 10, 1975, we notified you that the Rubbermaid fair trade program was discontinued effective July 1, 1975. Pursuant to an order of the Federal Trade Commission, this is to remind you that since that time you have been free to sell all Rubbermaid products to such customers and at such prices as you see fit. Any contrary suggestions from any source are unauthorized and should be promptly reported to the company. It is Rubbermaid's policy to distribute its goods through its wholesalers and retailers without regard either to the resale prices charged by such wholesalers and retailers or to the customers to whom they resell.

We look forward to serving you in the future as we have in the past. We feel certain that Rubbermaid will continue to represent an excellent source of sales volume to you and will continue to represent good value and a brand name to be depended upon by consumers.

Cordially yours,

E.C. Donaldson
Vice President
Marketing

EXHIBIT B

TO: All New Rubbermaid Wholesalers and Direct Purchasing Retailers

SUBJECT: Sales of Rubbermaid Products

We look forward to serving you and welcome you as a Rubbermaid customer. We wish to emphasize that all Rubbermaid wholesalers and retailers are free to sell all Rubbermaid products to such customers and at such prices as they see fit. Any contrary suggestions from any source are unauthorized and should promptly be reported to the company.

We feel certain that Rubbermaid will represent an excellent source of sales volume to you and will represent good value and a brand name to be depended upon by your customers.

Yours truly,

E.C. Donaldson
Vice President
Marketing

IN THE MATTER OF

JAMES B. LANSING SOUND, INC.

Docket C-1785. Interlocutory Order, Aug. 29, 1978

ORDER DENYING PETITION TO REOPEN

By petition of April 14, 1978, supplemented by reply memorandum of June 23, 1978,[1] respondent James B. Lansing Sound, Inc. (JBL) requests that a consent order issued against JBL on August 24, 1970 be modified to prohibit certain non-price vertical restrictions only when these restrictions are engaged in for the purpose of or with the effect of controlling retail prices.[2] JBL contends that changed conditions of law as well as the public interest warrant such a change. In particular, respondent relies upon the decision in *Continental T.V., Inc.* v. *GTE Sylvania*, 433 U.S. 36 (1977), and the presence of "vibrant intra-brand [sic] competition in the relevant product market" to support the requested modification. After due consideration of JBL's contentions, the Commission has determined to deny the petition.

As the Commission recently stated, *Sylvania* did not legalize territorial, customer, or other non-price vertical restrictions.[3] Rather, the court simply directed that non-price vertical restrictions which are not part of a larger price-fixing scheme be scrutinized under the rule of reason when challenged under the Sherman Act.[4] A respondent seeking relief from order prohibitions against vertical

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[1] Respondent's motion for leave to file a reply memorandum is granted.

[2] The Commission's order [77 F.T.C. at 1168] currently requires JBL to cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, establishing or setting of the prices at which its independent dealers or distributors may resell their products; *provided, however,* that nothing contained herein shall be construed to prevent respondent from engaging in a legitimate fair trade program in those states having fair trade laws.

2. Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses, except as may be expressly provided herein.

3. Preventing or prohibiting any independent dealer or distributor from soliciting sales outside of his market area.

4. Requiring its independent dealers or distributors to make their sales records available to respondent for inspection.

Respondent requests that the following language be inserted in lieu of Paragraphs 2, 3, and 4:

2. Engaging in any of the following activities for the purpose of or which have the effect of controlling the retail prices at which its products are sold or advertised:

(a) Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses.

(b) Preventing or prohibiting any independent dealer or distributor from soliciting sales outside of his market area.

(c) Requiring its independent dealers or distributors to make their sales records available to respondent for inspection.

[3] See Commission letter of May 19, 1978 to David J. Cynamon, Esq., regarding Performance Sailcraft, Inc., File No. 771 0027 at 2 ("Cynamon letter").

[4] The *Sylvania* Court noted that the jury had rejected the allegation that Sylvania's location restriction was part of a larger scheme to fix prices and characterized this finding as "[m]ost important." 433 U.S. at 41 n.9.

restrictions premised upon allegations that Section 5 has been violated[5] must therefore do more than assert that some of the practices covered by those prohibitions are no longer *per se* violations of the antitrust laws:

> [O]ne asking to be relieved of order provisions concerning such territorial restrictions should be prepared to show that its restraints would not be part of a price-setting mechanism; that the restraints would be reasonable; and that the prohibitions against territorial restraints required by the order have harmed or would harm substantially the respondent's competitive position. Insofar as such a claim of competitive harm rests upon the premise that the respondent's competitors are using such restraints, a respondent should also be prepared to show that such competitors' restraints are reasonable.[6]

From this perspective, it is clear that respondent has not demonstrated that it deserves relief from the strictures of the order. JBL maintains that competition is "extremely intense," that JBL "can under no circumstances be considered as dominating the U.S. loudspeaker market," that it would be unfair and contrary to the public interest "to burden respondent with prohibitions which are more restrictive than those which are applicable to its competitors * * *," and that JBL would suffer "severe competitive disadvantage" if the order is not modified. Yet, in support of these contentions JBL offers only two pieces of information: (1) JBL's estimated market share of 7 percent in the U.S. market; and (2) the presence of 165 different brands of loudspeakers for sale in the U.S. market.

Such a showing is on its face inadequate since it does not address the Commission's outstanding orders involving JBL's competitors.[7] With respect to other competitors who are not subject to similar cease and desist order, it is not clear to what extent these competitors are utilizing vertical restraints which are unavailable to JBL and which are "reasonable" under the antitrust laws, much less that JBL is under a "severe competitive disadvantage" as a result. Finally, it is impossible to endorse respondent's proferred modification absent a more comprehensive analysis of the intensity of interbrand competition in the market for loudspeakers. Respondent's share of the market viewed in conjunction with a listing of other available brands simply does not provide enough of an insight

[5] Of course, it is well-settled that conduct which falls short of violating the Sherman Act may nevertheless run afoul of Section 5. *E.g., F.T.C.* v. *Brown Shoe Co.*, 384 U.S. 316 (1966); *F.T.C.* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 242–46 (1972).

[6] Cynamon letter at 5 n.4.

[7] *TEAC Corp. of America*, Dkt. C-2752 (October 24, 1975) [86 F.T.C. 981]; *Sherwood Electronic Laboratories, Inc.*, Dkt. C-2753 (October 24, 1975) [86 F.T.C. 988]; *Sansui Electronics Corporation*, Dkt. C-2754 (October 24, 1975) [86 F.T.C. 955]; *U.S. Pioneer Electronics Corporation*, Dkt. C-2755 (October 24, 1975) [86 F.T.C. 1002]; *Nikko Electronic Corporation of America*, Dkt. C-2829 (July 12, 1976) [88 F.T.C. 31]; *United Audio Products, Inc.*, Dkt. C-2828 (July 12, 1976) [88 F.T.C. 24].

into the prevailing market structure and performance to facilitate an informed decision on the reasonableness of JBL's proposal.

Respondent attaches great significance to the Commission's acceptance of a consent order in *Levi Strauss & Co.*, Dkt. 9018, [92 F.T.C. ——] since that case also involved allegations of resale price maintenance. The Commission's decision to accept a more limited order in *Levi Strauss* than the order against JBL cannot be construed as representing any definitive policy statement regarding cases which encompass both price and non-price vertical restraints. Each case must and will be judged on its own merits. Accordingly,

It is ordered, That the respondent's petition is denied.

IN THE MATTER OF

AMERICAN SERVICE BUREAU, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FAIR CREDIT REPORTING ACT

Docket C-2926. Complaint, Sept. 7, 1978 — Decision, Sept. 7, 1978

This consent order, among other things, requires a Chicago, Ill. insurance investigations firm to cease soliciting or collecting impermissible information as a means of identifying consumers seeking required disclosure of file contents; and unfairly or deceptively attempting to obtain from consumers authorization to elicit excessive information. Additionally, the firm is required to provide those persons requesting or disputing file information a prescribed statement regarding their rights under the Fair Credit Reporting Act.

Appearances

For the Commission: *Dennis D. McFeely.*
For the respondent: *Richard V. Henry,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fair Credit Reporting Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that American Service Bureau, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows (all allegations hereinafter made in the present tense shall include the past tense):

PARAGRAPH 1. American Service Bureau, Inc. (hereinafter referred to as "ASB") is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 211 East Chicago Ave., Chicago, Illinois.

PAR. 2. Respondent disseminates written, oral or other communications of information bearing on consumers' credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and/or mode of living, which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing consumers' eligibility for credit or insurance to be used primarily for personal, family, or household

purposes, or employment purposes, or other purposes listed in Section 604 of the Fair Credit Reporting Act (hereafter sometimes "FCRA").

Therefore, the respondent disseminates "consumer reports" as defined in Section 603(d) of the Fair Credit Reporting Act.

PAR. 3. Respondent, for monetary fees, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties and uses means or facilities of interstate commerce for the purpose of preparing or furnishing consumer reports.

Therefore, respondent is a "consumer reporting agency" as defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 4. Respondent operates numerous branch offices throughout the United States. Respondent causes consumer reports and claims reports to be distributed through the mail from their branch offices located in many states to its customers located in other States of the United States, and in the ordinary course and conduct of its business regularly sends and receives substantial numbers of communications across state lines. "Claims reports" as used in this complaint is defined to mean all those reports prepared in connection with insurance claims.

Therefore, respondent maintains a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. When consumers request telephone disclosure of the nature and substance of information in their files, respondent, in the ordinary course and conduct of its business as aforesaid, sends to the requesting consumers a form transmittal letter, hereafter referred to as "transmittal letter," together with a questionnaire entitled "Identification and File Comparison" hereafter referred to as "identification form." The transmittal letter states, among other things:

> The law requires that we exercise extreme care to insure that information in our files is not divulged to unauthorized persons. By completing the enclosed Identification Form, #134, you will be providing the necessary verification information as required.
>
> * * * * * * *
>
> Upon receipt of the Identification and File Comparison Form, #134, signed as necessary, and payment if required, we will phone you collect, person to person, and disclose all the information we have in our file in accordance with the Fair Credit Reporting Act.

The identification form states, among other things:

This form when completed will provide proper identification as required by Public Law 91-508 (Fair Credit Reporting Act). It will also assist in our desire to keep your costs (Telephone Toll Charge) to a minimum when disclosure is made. Thank you.

The said identification form requests certain items of information, among others, through inclusion thereon of the following inquiries:

a. "Divorced ____";
b. "I have _____ dependents";
c. "I have been so employed for ____ years";
d. "Nature of my business is _____";
e. "My occupation for the past five years has been _____";
f. "My appr. worth is _____";
g. "My appr. income is _____";
h. "I own the following real estate _____";
i. "I have the following banking connections ____";
j. "Checking # _____";
k. "Savings # _____";
l. "Court records, if any, (Including Driving) in my name are as follows _____";
m. "References:

1. (Name) ____ (Address) _____ (Phone) ____
2. (Name) ____ (Address) _____ (Phone) ____
3. (Name) ____ (Address) _____ (Phone) ____
4. (Name) ____ (Address) _____ (Phone) ____"

PAR. 6. By and through its use of the transmittal letter and the identification form described in Paragraph Five, respondent represents that FCRA requires the completion of the identification form as a prerequisite to the providing of the telephone disclosures to consumers required by Section 610 of FCRA of the information required to be disclosed by Section 609 of FCRA. In truth and in fact, FCRA does not require the completion of the identification form as a prerequisite to the providing of the telephone disclosures to consumers required by Section 610 of FCRA of the information required to be disclosed by Section 609 of FCRA.

Therefore, the acts and practices alleged in Paragraph Five are unfair, misleading and deceptive.

PAR. 7. In a substantial number of instances respondent has failed to provide the disclosures required by Sections 609 and 610 of FCRA because some or all of the information sought to be elicited by requests "a" through "m" contained in the identification form described in Paragraph Five was not provided by the consumer. Inasmuch as the supplying by the consumer of such information is not a condition permitted by the Fair Credit Reporting Act to respondent's obligations under Sections 609 and 610 of that Act, the

stated failure of respondent to provide the disclosures is a violation of Sections 609 and 610 of FCRA.

PAR. 8. In addition to the identification form described in Paragraph Five, respondent, in the ordinary course and conduct of its business as aforesaid, encloses with the transmittal letter described in Paragraph Five an agreement form, hereafter referred to as "agreement," which is captioned as follows:

AGREEMENT

(To be signed and returned to the American Service Bureau)

The said agreement includes the following provision:

To assist me and the American Service Bureau, Inc. to resolve any items in question or in dispute in accordance with Public Law 91-508 (Fair Credit Reporting Act) I authorize the American Service Bureau, Inc. to conduct an investigation at its own expense and hereby authorize any business, any organization, any professional man, or anyone else, to disclose full information about me and to give to the American Service Bureau, Inc. copies of any records about me.

At the bottom of the agreement there is a place for the signature of the consumer.

PAR. 9. By and through their use of the transmittal letter and agreement described in Paragraph Eight, respondent represents that consumers seeking telephone disclosure of the information required to be disclosed by Section 609 of FCRA are required by respondent's internal procedures and/or FCRA to sign the agreement to obtain the disclosures.

In truth and in fact, it is not required by either respondent's internal procedures or FCRA that consumers seeking telephone disclosure of the information required to be disclosed by Section 609 of FCRA sign the said agreement to obtain the disclosures.

Therefore, the acts or practices alleged in Paragraph Eight are unfair, misleading, and deceptive.

PAR. 10. In the ordinary course and conduct of its business as aforesaid, when consumers appear in person to obtain disclosure of the information required to be disclosed by Section 609 of FCRA, respondent presents to the consumers a document captioned "STATEMENT CONCERNING CONTENTS OF FILE," hereafter sometimes referred to as "statement form." This document provides consumers with the option of accepting by signature the information in the file as disclosed or, alternatively, provides a space for consumers to

dispute statements in the file by providing a written statement of their own.

The statement form includes the following provision (hereafter referred to as the "dispute investigation authorization").

To assist me and the American Service Bureau, Inc. to resolve any items in question or in dispute in accordance with Public Law 91-508 (Fair Credit Reporting Act) I authorize the American Service Bureau, Inc. to conduct an investigation at its own expense and hereby authorize any business, any organization, any professional man, or anyone else, to disclose full information about me and give to the American Service Bureau, Inc. copies of any records about me.

At the bottom of the statement form there is a place for the signature of the consumer.

PAR. 11. By and through its use of the statement form described in Paragraph Ten, respondent represents that the Fair Credit Reporting Act requires the signing of the statement form and assent to the dispute investigation authorization contained therein as a prerequisite to consumers' rights to dispute the completeness or accuracy of any item of information on themselves contained in respondents' files.

In truth and in fact, the signing of the statement form and assent to the dispute investigation authorization is not a prerequisite to consumers' rights to dispute the completeness or accuracy of any item of information on themselves contained in respondent's files.

Therefore, the acts and practices alleged in Paragraph Ten are unfair, misleading and deceptive.

PAR. 12. In a substantial number of instances respondent has failed to permit consumers to dispute items of information in its files pursuant to Section 611(a) of FCRA unless they sign their name to the statement form described in Paragraph Ten. Inasmuch as the signing of the statement form requires assent to the dispute investigation authorization and such assent is not a permitted condition to the right of the consumer to dispute information or obtain a reinvestigation pursuant to Section 611(a) of FCRA, the above-stated failure of respondent is a violation of Section 611(a) of the Fair Credit Reporting Act.

Therefore, the acts or practices alleged herein are unfair, misleading and deceptive.

PAR. 13. The acts and practices set forth in Paragraphs Five, Six, Eight, Nine, Ten, and Eleven are in violation of Section 5 of the Federal Trade Commission Act. The acts and practices set forth in Paragraphs Five, Seven, Ten and Twelve are in violation of the Fair Credit Reporting Act, and pursuant to Section 621(a) thereof such acts and practices constitute unfair or deceptive acts or practices in

commerce in violation of Section 5 of the Federal Trade Commission Act.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Proposed respondent American Service Bureau, Inc. is a corporation organized and doing business under the laws of the State of Illinois, with its principal office located at 211 East Chicago Ave., Chicago, Illinois.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

I

It is ordered, That respondent American Service Bureau, Inc., a corporation, its successors and assigns, and its officers, respondent's agents, representatives and employees, directly or through any

corporation, subsidiary, division or other device, in connection with the operation of a consumer reporting agency as such is defined in the Fair Credit Reporting Act (hereafter sometimes "FCRA"), Pub. Law 91-508, (15 U.S.C. 1681, *et seq.*), do forthwith cease and desist from:

A. Obtaining or attempting to obtain from consumers seeking disclosure of the information required to be disclosed by Section 609 and 610 of the Fair Credit Reporting Act, any of the following items of information:

1. number of dependents,
2. past employment history,
3. approximate or actual worth,
4. approximate or actual income,
5. banking connections,
6. real estate owned by the consumer,
7. court records pertaining to the consumer,
8. names and addresses of references,
9. length of employment, or
10. nature of consumer's business.

B. Obtaining or attempting to obtain from consumers seeking disclosure of the information required to be disclosed by Section 609 and 610 of the Fair Credit Reporting Act, any information in excess of that which is necessary to establish the identity of the consumer who is seeking disclosure. *Provided, however,* that with respect to the requirements of this paragraph and Paragraph I.A., respondents may, as necessary only to comply with provisions of the Fair Credit Reporting Act, and after disclosure pursuant to Sections 609 and 610 of FCRA, inquire about the above items of information.

C. Obtaining or attempting to obtain from consumers who dispute the completeness or accuracy of any item of information contained in their files, or who seek disclosure of information which is required to be provided by Sections 609 and 610 of FCRA, an agreement or writing signed by the consumer which authorizes an investigation concerning the consumer or which authorizes anyone to give information or records about a consumer to respondents; *provided, however,* that if respondents are denied information in connection with a re-investigation under Section 611 of the Fair Credit Reporting Act after contacting a specific source, respondent may seek from the consumer a separate authorization to obtain from a specific source named in the authorization, specific items of information (other than medical information) which are relevant to the subject matter of the re-investigation; *provided further,* that the authorization permitted by this provision shall clearly and conspicu-

ously disclose to the consumer in writing: (1) that executing the authorization is not a condition to the re-investigation of the disputed item; and (2) that the consumer's failure to execute the authorization does not affect his or her right to have information deleted which is found to be inaccurate or which can no longer be verified.

D. Failing to provide each consumer who either requests disclosure of information in his or her file or who disputes the completeness or accuracy of information in his or her file, an exact facsimile of Exhibit A attached hereto without utilizing language additional to that which is contained in Exhibit A.

II

IT IS FURTHER ORDERED, That respondent American Service Bureau, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with complying with the requirements of the Fair Credit Reporting Act, the preparation of consumer reports, investigative consumer reports, claims reports, or other reports containing information about consumers, in or affecting commerce, do forthwith cease and desist from:

Representing that consumers are required by the Fair Credit Reporting Act to provide information, fulfill conditions, execute documents, authorize actions or assent to provisions, when such are not required by the Fair Credit Reporting Act; or otherwise misrepresenting directly or indirectly the requirements of the Fair Credit Reporting Act.

III

IT IS FURTHER ORDERED, That respondent shall, at all times subsequent to the effective date of this order, maintain complete business records relative to the manner and form of its compliance with this order for a two-year period. Such records shall include all policy directives, complaints from consumers, and other pertinent documents. Such records shall be kept in chronological order separate from the consumer reporting files and shall be made available for inspection and photocopying by any authorized representative of the Federal Trade Commission upon reasonable notice at respondent's place of business or other properly designated location.

IV

IT IS FURTHER ORDERED, That respondent deliver a copy of this order to each present and future officer of the corporation and all present and future management personnel to and including the level of branch manager. Further, respondent shall deliver to all personnel now or hereafter engaged in the disclosure of contents of consumer reports to consumers a copy of Section I and II of this order. Further, respondent shall secure from each of these persons a signed statement acknowledging receipt of the order or the relevant portion thereof.

V

IT IS FURTHER ORDERED, That respondent notify the Commission at least thirty days prior to the effective date of any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change in said corporations which may affect compliance obligations arising out of the order.

VI

IT IS FURTHER ORDERED, That the respondent herein shall, within sixty days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

EXHIBIT A

This information explains your rights under the Fair Credit Reporting Act. The American Service Bureau is a consumer reporting agency. We provide "Investigative Consumer Reports," a special type of a "Consumer Report." This pamphlet describes your rights and our responsibility for all types of consumer reports.

FAIR CREDIT REPORTING ACT

If you have a charge account, a mortgage on your home, life insurance, or have applied for a personal loan or job it is almost certain there is a "file" existing somewhere that shows how you pay your bills, if you have been sued, arrested, or filed for bankruptcy, etc.

And some of these files include your neighbors' and friends' views of your character, general reputation, or manner of living.

The companies that gather and sell such information to creditors, insurers, employers, and other businesses are called "Consumer Reporting Agencies," and the legal term for the report is a "Consumer Report."

If, in addition to credit information, the report involves interviews with a third person about your character, reputation, or manner of living, it is referred to as an "Investigative Consumer Report."

THE FAIR CREDIT REPORTING ACT became law on April 25, 1971. It was passed by Congress to protect consumers against the circulation of inaccurate or obsolete information, and to insure that consumer reporting agencies exercise their responsibilities in a manner that is fair and equitable to consumers.

Under this new law you can now take steps to protect yourself if you have been denied credit, insurance, or employment, or if you believe you have had difficulties because of a consumer report on you.

Here are the steps you can take.

YOU HAVE THE RIGHT:

1. To be told the name and address of the consumer reporting agency responsible for preparing a consumer report that was used to deny you credit, insurance, or employment or to increase the cost of credit or insurance.

2. To be told by a consumer reporting agency the nature, substance and sources (except investigative-type sources) of the information (except medical) collected about you.

3. To take anyone of your choice with you when you visit the consumer reporting agency to check on your file.

4. To obtain all information to which you are entitled, free of charge, when you have been denied credit, insurance, or employment within 30 days of your interview. Otherwise, the reporting agency is permitted to charge a reasonable fee for giving you the information.

5. To be told who has received a consumer report on you within the preceding six months (two years if the report was furnished for employment purposes).

6. To have incomplete or incorrect information re-investigated, unless the request is frivolous, and, if the information is found to be inaccurate or cannot be verified, to have such information removed from your file.

7. To have the agency notify those you name (at no cost to you) who have previously received the incorrect or incomplete information that this information has been deleted from your file.

8. When a dispute between you and the reporting agency about information in your file cannot be resolved, you have the right to have your version of such dispute placed in the file and included in future consumer reports.

9. To request the reporting agency to send your version of the dispute to certain businesses if requested within 30 days of the adverse action.

10. To have a consumer report withheld from anyone who under the law does not have a legitimate business need for the information.

11. To sue a reporting agency for damages if it willfully or negligently violates the law and, if you are successful, you can collect attorney's fees and court costs.

12. Not to have adverse information reported after seven years. The major exceptions are (a) bankruptcies, which may be reported for 14 years; (b) and no limitation (1) if an application for life insurance is involved in which the face value of the policy equals $50,000 or more, or (2) if the report concerns employment at an annual salary equaling $20,000 or more.

13. To be notified by a business that it is seeking information about you which would constitute an "Investigative Consumer Report."

14. To request from the business that ordered an investigative report, more information about the nature and scope of the investigation.

15. To discover the nature and substance (but not the sources) of the information that was collected for an "Investigative Consumer Report."

THE FAIR CREDIT REPORTING ACT DOES NOT:

1. Give you the right to request a report on yourself from the consumer reporting agency.

2. Give you the right, when you visit the agency, to receive a copy of or to physically handle your file.

3. Compel anyone to do business with an individual consumer.

4. Apply when you request commercial (as distinguished from consumer) credit or business insurance.

5. Authorize any Federal agency to intervene on behalf of an individual consumer.

HOW TO DEAL WITH CONSUMER REPORTING AGENCIES

If you want to know what information a consumer reporting agency has collected about you, either arrange for a personal interview at the agency's office during normal business hours or call in advance for an interview by telephone.

The consumer reporting agencies in your community can be located by consulting the "Yellow Pages" of your telephone book under such headings as "Credit" or "Credit Rating or Reporting Agencies."

If you decide to visit a consumer reporting agency to check on your file the following check list may be of help.

For instance, DID YOU:

1. Learn the nature and substance of all the information in your file?

2. Learn the names of everyone who received reports on you within the past six months (or the last two years if the reports were for employment purposes)?

3. Request the agency to re-investigate and correct or delete information that was found to be inaccurate, incomplete, or obsolete?

4. Follow-up to determine the results of the re-investigation?

5. Ask the agency, at no cost to you, to notify those you name who received reports within the past six months (two years if for employment purposes) that certain information was deleted?

6. Follow-up to make sure that those named by you did in fact receive notices from the consumer reporting agency?

7. Demand that your version of the facts be placed in your file if the re-investigation did not settle the dispute?

8. Request the agency to send your statement of the dispute to those you name who received reports containing the disputed information within the past six months (two years if received for employment purposes)?

For more detailed information on the Fair Credit Reporting Act or to report a violation of the Act contact the FTC in Washington or the nearest regional office. The FTC offices are located in the following cities:

ATLANTA, Ga.; BOSTON, Mass.; CHICAGO, Ill.; CLEVELAND, Ohio; DALLAS, Texas; DENVER, Colo.; HONOLULU, Hawaii; LOS ANGELES, Calif.; NEW YORK, N.Y.; SAN FRANCISCO, Calif.; SEATTLE, Wash.; WASHINGTON, D.C.

Look under "Federal Trade Commission" in the telephone directories of these cities for the addresses and telephone numbers of the field offices.

IN THE MATTER OF

JAY NORRIS CORPORATION, ET AL.

Docket 9054. Interlocutory Order, Sept. 11, 1978

Order denying respondents' petition for ruling on thirty (30) day advance notice to FTC of any proposed change in corporate respondent.

ORDER ON PETITION FOR RULING

Respondents have filed a Petition for Ruling requesting that the Commission address the argument made in their appeal brief challenging the requirement contained in Part III of the administrative law judge's ("ALJ") order of a thirty-day advance notice to the Commission of any proposed change in the corporate respondents. The ALJ concluded that there was nothing "improper or burdensome" about this requirement. (ID p. 73) While the Commission did not specifically address respondents' argument on this point, it expressly adopted the ALJ's initial decision as the Findings of Fact and Conclusions of Law of the Commission, except to the extent modified or otherwise indicated in the Commission's opinion. (Order at 2) Accordingly,

IT IS ORDERED, That respondents' Petition for Ruling is denied.

IN THE MATTER OF

PUBLIC SERVICE CO. OF COLORADO

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2927. Complaint, Sept. 12, 1978 — Decision, Sept. 12, 1978

This consent order, among other things, requires a Denver, Colo. utility company to cease, in connection with the advertising and sale of non-utility products and services, failing to properly provide consumers with credit disclosures required by Federal Reserve System regulations.

Appearances

For the Commission: *John H. Evans* and *Kenneth R. Bennington.*
For the respondent: *James R. McCotter,* Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Public Service Co. of Colorado, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and the implementing regulations promulgated under the Truth in Lending Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Public Service Co. of Colorado is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado with its principal office and place of business located at 550 Fifteenth St., Denver, Colorado.

PAR. 2. Respondent is now and for many years has been, engaged in the generation, purchase, transmission, distribution, and sale of electricity, and in the purchase, transmission, distribution, and sale of natural gas. Respondent also advertises for sale and sells to consumers a variety of products and services not provided through pipe, wire, or other connected facilities. Such products and services include insulation for, and the installation of insulation in, residential premises.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent regularly extends or arranges for the extension of consumer credit, and is a creditor, as "consumer credit" and

"creditor" are defined in Section 226.2 of Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601, *et seq., as amended*), duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent has entered into credit transactions with consumer customers for the installation of insulation in residential premises, in which transactions, under the provisions of COLO. REV. STAT. §§38-22-101, *et seq.*, a security interest, as "security interest" is defined in Section 226.2 of Regulation Z, is or will be retained or acquired in real property which is used or is expected to be used as the principal residence of the customer.

PAR. 5. There have not been waivers of lien rights by all potential security interest claimants in connection with the credit transactions referred to in Paragraph 4.

PAR. 6. Respondent's entry into the transactions described in Paragraph 4, in which a security interest is or will be retained by respondent or other potential lien claimants, entitles respondent's consumer customers to proper notification of their right to rescind such transactions, without penalty, through midnight of the third business day following consummation of the transaction or delivery of all material disclosures, whichever is later, pursuant to Section 226.9 of Regulation Z.

PAR. 7. In connection with the credit transactions referred to in Paragraph 4, respondent has failed to give consumer customers proper notice of their right to rescind, as well as notice of the effect of rescission, as required by Section 226.9 of Regulation Z in the manner and form set forth therein.

PAR. 8. Subsequent to July 1, 1969, in the ordinary course and conduct of its business as aforesaid, respondent has caused to be published advertisements for goods and services, which advertisements aid, promote, or assist, directly or indirectly, credit sales and other extensions of other than open end credit, as "advertisement" and "credit sale" are defined in Section 226.2 of Regulation Z.

PAR. 9. In certain of the advertisements referred to in Paragraph 8, respondent has stated the rate of the finance charge as other than an "annual percentage rate," contrary to the provisions of Section 226.10(d)(1) of Regulation Z.

PAR. 10. In certain of the advertisements referred to in Paragraph 8, respondent has stated the amount of the downpayment (as a percentage of the sales price) without also stating, as required by Section 226.10(d)(2) of Regulation Z, all of the following terms:

(a) the cash price;

(b) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(c) the amount of the finance charge expressed as an annual percentage rate; and

(d) the deferred payment price.

PAR. 11. By and through the acts and practices set forth above, respondent has failed to comply with the requirements of Regulation Z, the implementing Regulation of the Truth in Lending Act. Pursuant to Section 103(s) of the Truth in Lending Act, such failure to comply with Regulation Z constitutes a violation of that Act, and pursuant to Section 108(c) thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof and the respondent having been furnished thereafter with a copy of a draft of complaint which the Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act and of the Truth in Lending Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of the findings of facts attached as Appendix A to the aforesaid agreement, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated said Acts, and that complaint should issue stating its charges in that respect and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following findings of fact, and enters the following order:

FINDINGS

1. Respondent Public Service Co. of Colorado is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its offices and principal place of business located at 550 Fifteenth St., in the city of Denver, State of Colorado.

2. Respondent is now and for many years has been, engaged in the generation, purchase, transmission, distribution, and sale of electricity, and in the purchase, transmission, distribution, and sale of natural gas. Respondent also advertises for sale and/or sells to consumers products and services not provided through pipe, wire, or other connected facilities. In order to promote the conservation of energy, respondent has initiated an insulation program in connection with which it advertises for sale and sells to consumers insulation for, and the installation of insulation in, residential premises.

3. In the ordinary course and conduct of its business as aforesaid, respondent regularly extends or arranges for the extension of consumer credit, and is a creditor, as "consumer credit" and "creditor" are defined in Section 226.2 of Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601, *et seq., as amended),* duly promulgated by the Board of Governors of the Federal Reserve System.

4. Subsequent to September 1, 1975, respondent has entered into credit transactions with consumer customers for the installation of insulation in residential premises, in which transactions, under the provisions of COLO. REV. STAT. §§38-22-101, *et seq.,* a security interest, as "security interest" is defined in Section 226.2 of Regulation Z, is or will be retained or acquired in real property which is used or is expected to be used as the principal residence of the customer.

5. There have not been waivers of lien rights by all potential security interest claimants in connection with the credit transactions referred to in Paragraph 3; however, respondent has never attempted to enforce such lien rights.

6. Respondent's entry into the transactions described in Paragraph 3, in which a security interest is or will be retained by respondent or other potential lien claimants, entitles respondent's consumer customers to proper notification of their right to rescind such transactions, without penalty, through midnight of the third business day following consummation of the transaction or delivery

of all material disclosures, whichever is later, pursuant to Section 226.9 of Regulation Z.

7. In connection with the credit transactions referred to in Paragraph 3, respondent notified its customers of their right to rescind the transactions within three days; however, such notice did not completely comply with the requirements of Section 226.9 of Regulation Z in that it failed to include substantive information and follow the form set forth therein. Once the matter was brought to respondent's attention, its forms were revised to comply with Section 226.9 of Regulation Z.

8. Subsequent to September 1, 1975, in the ordinary course and conduct of its business as aforesaid, respondent has caused to be published advertisements for goods and services, which advertisements aid, promote, or assist, directly or indirectly, credit sales and other extensions of other than open end credit, as "advertisement" and "credit sale" are defined in Section 226.2 of Regulation Z.

9. In one of the advertisements referred to in Paragraph 7, respondent stated the rate of the finance charge as "annual interest rate," rather than as an "annual percentage rate," as required by the provisions of Section 226.10(d)(1) of Regulation Z.

10. In the same advertisement referred to in Paragraph 7, respondent stated the amount of the downpayment (as a percentage of the sales price) without also stating, as required by Section 226.10(d)(2) of Regulation Z, the deferred payment price.

11. Respondent has cooperated fully in the Commission's investigation and has made available all records and documents requested by the Commission during the course of such investigation.

12. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Public Service Co. of Colorado, a corporation, its successors and assigns and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any extension or arrangement for the extension of consumer credit, or in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (15 U.S.C. 1601, *et seq., as amended)* do forthwith cease and desist from:

1) Entering into any credit transaction, including, but not limited

to, transactions for the installation of insulation, in which a security interest, as "credit" and "security interest" are defined in Section 226.2 of Regulation Z, is or will be retained or acquired in real property which is used or is expected to be used as the principal residence of a consumer customer, without giving the customer notice of his or her right to rescind said transaction, without penalty, until midnight of the third business day following the date of consummation of the transaction or delivery of all material disclosures, whichever is later, as required by Section 226.9 of Regulation Z and in the manner and form set forth therein.

2) Stating in any credit advertisement the rate of finance charge unless said rate is expressed as an annual percentage rate (using the term "annual percentage rate"), as "finance charge" and "annual percentage rate" are defined in Section 226.2 of Regulation Z, as required by Section 226.10(d)(1) of Regulation Z.

3) Stating in any credit advertisement that no downpayment is required, or stating the amount of the downpayment or of any installment payment required (either in dollars or as a percentage), the dollar amount of any finance charge, the number of installments or the period of repayment, or stating that there is no charge for credit, unless all of the following items are also clearly and conspicuously set forth in terminology prescribed by Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(a) the cash price;

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, the amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(d) the amount of the finance charge expressed as an annual percentage rate; and

(e) the deferred payment price.

4) Failing in any consumer credit transaction or advertisement, to make all disclosures that are required by Section 226.6, Section 226.7, Section 226.8, Section 226.9, and Section 226.10 of Regulation Z in the manner, form, and amount specified therein.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its operating divisions, to

each person responsible for or connected with preparation of its advertisements, and to each person responsible for or connected with solicitation and sale of residential insulation for respondent, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondent Public Service Co. of Colorado shall, within sixty (60) days after this order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

FINDINGS OF FACT

FINDINGS

1. Proposed respondent is now and for many years has been, engaged in the generation, purchase, transmission, distribution, and sale of electricity, and in the purchase, transmission, distribution, and sale of natural gas. Respondent also advertises for sale and/or sells to consumers products and services not provided through pipe, wire, or other connected facilities. In order to promote the conservation of energy, proposed respondent has initiated an insulation program in connection with which it advertises for sale and sells to consumers insulation for, and the installation of insulation in, residential premises.

2. In the ordinary course and conduct of its business as aforesaid, proposed respondent regularly extends or arranges for the extension of consumer credit, and is a creditor, as "consumer credit" and "creditor" are defined in Section 226.2 of Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601, *et seq., as amended*), duly promulgated by the Board of Governors of the Federal Reserve System.

3. Subsequent to September 1, 1975, proposed respondent has entered into credit transactions with consumer customers for the installation of insulation in residential premises, in which transactions, under the provisions of COLO. REV. STAT. §§38-22-101, *et seq.*, a security interest, as "security interest" is defined in Section 226.2 of Regulation Z, is or will be retained or acquired in real property which is used or is expected to be used as the principal residence of the customer.

4. There have not been waivers of lien rights by all potential security interest claimants in connection with the credit transactions referred to in Paragraph 3; however, proposed respondent has never attempted to enforce such lien rights.

5. Proposed respondent's entry into the transactions described in Paragraph 3, in which a security interest is or will be retained by proposed respondent or other potential lien claimants, entitles proposed respondent's consumer customers to proper notification of their right to rescind such transactions, without penalty, through midnight of the third business day following consummation of the transaction or delivery of all material disclosures, whichever is later, pursuant to Section 226.9 of Regulation Z.

6. In connection with the credit ransactions referred to in Paragraph 3, proposed respondent notified its customers of their right to rescind the transactions within three days; however, such notice did not completely comply with the requirements of Section 226.9 of Regulation Z in that it failed to include substantive information and follow the form set forth herein. Once the matter was brought to proposed

respondent's attention, its forms were revised to comply with Section 226.9 of Regulation Z.

7. Subsequent to September 1, 1975, in the ordinary course and conduct of its business as aforesaid, proposed respondent has caused to be published advertisements for goods and services, which advertisements aid, promote, or assist, directly or indirectly, credit sales and other extensions of other than open end credit, as "advertisement" and "credit sale" are defined in Section 226.2 of Regulation Z.

8. In one of the advertisements referred to in Paragraph 7, proposed respondent stated the rate of the finance charge as "annual interest rate," rather than as an "annual percentage rate," as required by the provisions of Section 226.10(d)(1) of Regulation Z.

9. In the same advertisement referred to in Paragraph 7, proposed respondent stated the amount of the downpayment (as a percentage of the sales price) without also stating, as required by Section 226.10(d)(2) of Regulation Z, the deferred payment price.

10. Proposed respondent has cooperated fully in the Commission's investigation and has made available all records and documents requested by the Commission during the course of such investigation.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Sept. 13, 1978

Affirmance of ALJ's order denying intervention and allowing filing of amicus curiae brief.

ORDER AFFIRMING ORDERS OF THE ADMINISTRATIVE LAW JUDGE

On July 10, 1978, having been granted an extension of time, the American Federation of Grain Millers (AFL–CIO) ("International Union") filed an Application for Review from the Administrative Law Judge's denial of their Motion to Intervene. The Application was filed pursuant to Rule 3.23(a) of the Commission's Rules of Practice.

The complaint in this matter was filed over six years ago on April 26, 1972. As part of the relief, should a violation be found, it has been proposed that five corporate entities be divested or "spun-off" from the various respondents. Because the newly created entities would not be legally bound to hire the employees currently working for the respondents, nor be bound to adopt, preserve or maintain the level of benefits in the collective bargaining agreements, the International Union requests intervention.

Section 5(b) of the Federal Trade Commission Act and Rule 3.14 of the Commission's Rules of Practice provide for the intervention by any person, partnership, or corporation "upon good cause shown." Both provisions "clearly reflect the fact that intervention in Commission adjudications is a matter of privilege, and that its grant or denial is a discretionary matter, to be decided on the basis of the particular facts and circumstances involved in each case in which intervention is sought." *Firestone Tire & Rubber Co.*, 77 F.T.C. 1666, 1668 (1970).

As was noted by Judge Hinkes, the issue before us is similar to that in *Heublein, Inc.*, 82 F.T.C. 1826 (1973), in which the Allied Grape Growers sought to intervene for purposes of protecting their interests in a joint venture agreement with Heublein. Though we noted that Allied's contractual relations might be adversely affected by the outcome of the Commission's proceeding, we held there that Allied's concerns dealt primarily with the issue of relief rather than the issue of liability, and so limited their participation. Insofar as Allied's interests related to the competitive questions at stake in the

proceeding, we concluded that its interests would be adequately represented.

We see no reason for different treatment here. Indeed, depending on the outcome of the litigation, the International Union's concerns may prove to be premature. Rather than delay a proceeding which has been in progress for six years, Judge Hinkes has correctly provided for the filing of an amicus brief. In this way he and the Commission can have the benefit of the International Union's views, if the need arises, without complicating or delaying the proceedings.

The International Union also argues that under Rule 24 of the Federal Rules of Civil Procedure and *PepsiCo* v. *Federal Trade Commission,* 472 F.2d 179 (2d Cir. 1972), there is an absolute right to intervene. However, even assuming the applicability of the principle underlying Rule 24 to our proceedings, we see no basis for reaching a result different from that which obtains under the Commission's rules.

While the Commission recognizes the importance of the matters raised by the International Union, the interest which the International Union seeks to assert, *i.e.,* that of employment rights and benefits under the collective bargaining agreement, is in no way related to the alleged antitrust liability of respondents and is therefore not the proper subject for intervention. Accordingly,

It is ordered, That the Administrative Law Judge's Order Denying Motion to Intervene and Allowing the Filing of an Amicus Curiae Brief be, and the same hereby is, affirmed.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

USLIFE CREDIT CORP., ET AL.

MODIFYING ORDER AND OPINION IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9057. Decision, May 23, 1978 — Modifying Order, Sept. 14, 1978

This order, granting and denying in part respondents' petition for reconsideration, modifies the cease and desist order issued on May 23, 1978, 43 FR 34124, 91 F.T.C. 985, by deleting from the first line of paragraph 2 the word "Failing," and inserting the word "Failing" as the first word of subparagraph (a) of paragraph 2.

ORDER GRANTING IN PART, AND DENYING IN PART, RESPONDENTS' PETITION FOR RECONSIDERATION

An opinion and final order in this matter having been issued on May 23, 1978; respondents having been served by mail with the said opinion and order on July 19, 1978; respondents having petitioned for reconsideration of said opinion and order on August 10, 1978; and the Commission, for the reasons stated in the accompanying opinion, having determined to grant in part, and deny in part, respondents' petition for reconsideration;

It is ordered, That the final order to cease and desist be, and hereby is, modified as follows:

From the first line of paragraph 2 of the Order, delete the word "Failing."

In subparagraph (a) of paragraph 2 of the Order, insert as the first word thereof the word "Failing."

Commissioner Pitofsky did not participate.

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

Respondents have petitioned for reconsideration of our recent opinion and order in which we held that certain of their practices in connection with the sale of credit life and credit disability insurance violated the Truth in Lending Act ("TILA") (15 U.S.C. 1601, *et seq.*), Regulation Z (12 C.F.R. 226) and the Federal Trade Commission Act ("FTC Act") (15 U.S.C. 41, *et seq.*),

Respondents urge (1) that our interpretation of the pertinent provisions of the TILA and Regulation Z is novel and unsupportable, and that our decision rests upon supposed practices neither alleged

in the complaint, nor made a part of the record before the administrative law judge ("ALJ"); (2) that the Commission's opinion is undercut by two Court of Appeals decisions and a Federal Reserve Board ("FRB") staff interpretation, all of which were rendered after the Commission took the case under advisement; (3) that the cease and desist order is overbroad and that it unfairly penalizes respondents' employees; and (4) that they have been denied due process, because the Commission acted as "investigator, complainant, prosecutor, judge and legislature."

Section 3.55 of the Commission's Rules of Practice limits the scope of a petition for reconsideration to "new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." We find that while certain of respondents' objections are inappropriate for disposition by reconsideration, other contentions are permissible in this context, and they warrant a brief opinion.

I.

First, respondents object to our holding that their routine and automatic inclusion of insurance premiums in loan agreement papers prior to obtaining the customer's written aproval for insurance, when considered in the context of this record as a whole, constituted a violation of the TILA and Regulation Z. In essence, respondents simply disagree with our holding; in the absence of a new issue, therefore, reconsideration of this question is inappropriate. Nonetheless, in our discretion, we think it useful to note that the Commission has examined the additional authorities cited by respondents, and finds that respondents have misapprehended their application to this case.

Respondents assert that our opinion conflicts with Section 129(b) of the TILA and Section 226.8(a)(1) of Regulation Z. They contend that these provisions require no more than that the necessary written disclosures be made to the consumer by the time of the closing, rather than prior to completion of the loan agreement form. But these provisions are inapplicable here. Section 129(b) addresses only the timing of disclosures specified in Section 129(a), all of which are found in Chapter 2 of TILA; the insurance authorization disclosure requirements are located in Chapter 1, and are not addressed by Section 129(a) in any event. Similarly, Section 226.8(a)(1) of Regulation Z governs only disclosures required by Section 226.8; the credit insurance authorization is required by Section 226.4(a)(5). Respondents' further reliance upon FRB Letter No. 408 as allegedly undermining FRB Letter No. 398 is also

misplaced. Nothing in Letter No. 408 retracts the FRB's condemnation, expressed in Letter No. 398, of the practice of automatically preparing loan documents with the cost of insurance included in the completed calculations. Finally, respondents' reliance upon the model form which appears as Exhibit C, 1 *Cons. Cred. Guide* (CCH) ¶2853, is without avail. Exhibit C is exemplary only of a proper disclosure format. But the sufficiency of respondents' forms is not at issue; rather, we are concerned with respondents' other practices designed to encourage selection of credit insurance, notwithstanding the apparent propriety of the form utilized.

Respondents' next assertion is that the Commission's decision is based upon a charge not made in the complaint and upon which the ALJ took no evidence. We find this allegation to be without merit. The complaint adequately alleged the violations which the Commission has found, *e.g.*, that insurance was automatically included in many loan documents prior to closing without the consumer's knowledge. *See, e.g.*, complaint ¶4(2) and Opinion at 15. And the record is replete with testimony which establishes that automatic inclusion of insurance charges in the loan documents operates, directly or indirectly, to defeat the elective language of the insurance authorization and to prevent consumers from exercising a free choice of whether to obtain credit insurance.

Respondents maintain that the charges reflected in the complaint involved only the issue of whether or not consumers orally authorized insurance prior to signing the written disclosure at the closing. Yet, however, the issues are framed, both the complaint and the trial clearly focused on the adequacy as well as the existence of respondents' oral disclosures before insurance was included in the loan papers. Indeed, we found on the basis of record evidence that even to the extent oral disclosures may have been made in some instances, they were inadequate to alert many consumers to the optional nature of credit insurance. Review of the applicable legal standards manifests the adequacy of the complaint in this respect.

The propriety of a pleading is judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought. *Curtiss-Wright Corp., Wright Aero. Div.* v. *NLRB*, 347 F.2d 61, 72 (3d Cir. 1965); *Intercontinental Indus., Inc.* v. *American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. den.*, 409 U.S. 842 (1972). A complaint in an administrative proceeding need not enumerate precisely every event to which an agency may finally attach significance. *L. G. Balfour* v. *FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *see also ITT Continental Baking Co., Inc.* v. *FTC*, 532 F.2d 207, 215–18 (2d Cir. 1976). Thus, the complaint is sufficient if "the

one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was mislead." *L. G. Balfour, supra* at 19, citing *Cella* v. *United States,* 208 F.2d 789 (7th Cir. 1953), *cert. den.,* 347 U.S. 1016 (1954). Measured against this standard, individually and collectively, the allegations of the complaint sufficiently apprised respondents of the alleged violations for which they were ultimately held. *See Golden Grain Macaroni Co.* v. *FTC,* 472 F.2d 882, 886 (9th Cir. 1972), *cert. den.,* 412 U.S. 918 (1973); *A. E. Staley Mfg. Co.* v. *FTC,* 135 F.2d 453, 454 (7th Cir. 1943).

Furthermore, we are convinced that the fundamental requirements of due process were met when, as the case unfolded, respondents were afforded a reasonable opportunity to meet and rebut these allegations. *See, e.g., Curtiss-Wright Corp., supra; Golden Grain Macaroni, supra; Swift & Co.* v. *United States,* 393 F.2d 247, 252 (7th Cir. 1968); *J. B. Williams Co.* v. *FTC,* 381 F.2d 884, 888 (6th Cir. 1967).

Accordingly, we cannot credit respondents' contention that "the Commission has found a violation on the basis of a charge that was never made."

II.

Second, respondents rely upon new authorities to support their contentions (a) that their compliance with the TILA may be measured only by the adequacy of the written disclosure form, and (b) that the Commission erred in holding that respondents violated Regulation Z because their insurance authorization form was not separately dated. We reject the first of these contentions, but accept the second, and withdraw our finding that respondents' failure to obtain a separate date on the insurance authorization constituted an independent violation of Regulation Z. We note, however, that this finding does not compel any change in the provisions of the cease and desist order.

Respondents cite *Anthony* v. *Community Loan & Investment Corp.,* 559 F.2d 1363 (5th Cir. 1977), and a recent FRB Official Staff Interpretation, FC–0119, 42 F.R. 55881 (Oct. 20, 1977) [1974–1977 Transfer Binder] *Cons. Cred. Guide* (CCH) ¶31,705 in support of the first contention. Neither of these authorities, however, compels us to alter our decision.

In the *Anthony* case, a private suit for damages under TILA, the Fifth Circuit held that a credit customer's assertion that she had neither requested nor desired insurance, but had simply signed the loan documents which included an insurance election, was insuffi-

cient to vary the terms of her contract or to negate the executed insurance authorization. In reaching this result, the court applied the Georgia parol evidence rule to exclude plaintiff's proferred oral evidence that defendant had given her the impression that insurance was required. 559 F.2d at 1369.

Notwithstanding that the findings of fact in the instant case are bottomed, in part, upon the type of consumer testimony which was excluded by the Fifth Circuit in *Anthony*, we do not view that decision as necessarily inconsistent with our own. Sound reasons of judicial administration may argue for not entertaining such oral testimony in the context of private damage litigation, where doing so might weaken the principles underlying the parol evidence doctrine or open the gates of the courthouse to frivolous litigation. But these factors are not present here.

It is clear that the Commission, as a law enforcement agency, empowered by Congress with a mandate to prevent unfair and deceptive practices and to enforce the TILA and Regulation Z, may hear all such evidence as is necessary to establish whether violations of law have occurred. Frequently, the existence of a pattern of deception can be proved only by resort to oral testimony, including so-called "parol evidence." The evidentiary standard on which the *Anthony* decision is based is simply not applicable to an FTC administrative enforcement proceeding.[1] A recent case regarding the admissibility of parol evidence in administrative proceedings is on point. In *Western Union Telegraph Co.* v. *FCC*, 541 F.2d 346, 353 (3d Cir. 1976), *cert. den.*, 429 U.S. 1092 (1977), the Third Circuit held that "as a matter of administrative law, . . . the Commission was not bound to apply the parol evidence rule." The court continued that:

> the basic precept of administrative law [on the standards of admissibility of evidence is] set forth in §556(d) of the Administrative Procedure Act: "Any oral evidence or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence . . ." We recognize that the parol evidence rule is frequently said to be a rule of substantive law and not a rule of evidence. No reason is apparent why the FCC could not apply the rule as a matter of substantive law or policy, if it chose to do so, but we hardly imagine that it is required to do so in view of the plain language of §556(d) that "[any] oral or documentary evidence may be received." 541 F.2d at 353 and n. 14.

Accordingly, we do not believe that *Anthony* is inconsistent with

[1] In general, evidentiary and exclusionary rules applicable to judicial trials have little bearing in administrative proceedings. *See, e.g., Opp Cotton Mills, Inv.* v. *Administrator*, 312 U.S. 126, 155 (1941); 2 Davis, *Administrative Law Treatise*, §14.08 at 284 (1958), citing Rep. Atty. Gen. Comm. Ad. Proc. 70 (1941) ("An administrative agency must serve a dual purpose in each case: It must decide the case correctly as between the litigants before it, and it must also decide the case correctly so as to serve the public interest which it is charged with protecting. This second important factor makes it necessary to keep open the channels for the reception of all relevant evidence which will contribute to an informed result.").

our earlier determination in this matter, to which we adhere. Nothing in the Commission's Rules of Practice, including Section 3.43(b), requires or suggests a different result.

Next, review of FRB Official Staff Interpretation FC–0119 demonstrates that respondents have misunderstood the thrust of that letter. FRB staff there address only the sufficiency of the wording of the disclosure in the correspondent's form. No intimation that an inquiry may not properly be carried beyond the form itself may be drawn from that letter. Indeed, two subsequent FRB Staff Opinion Letters reveal that the FRB staff interprets Regulation Z in a manner squarely in accordance with our recent decision in this case.

In FRB Letter No. 1270 (December 20, 1977), 5 *Cons. Cred. Guide* (CCH) ¶31,756, the author of FC–0119 wrote:

> FC–0119 was intended by staff to deal only with the method by which a customer might indicate, in writing, his or her desire for credit life, accident, health, or loss of income insurance in order to comply with §226.4(a)(5)(ii) of Regulation Z. Staff did not and does not mean to suggest that, because a customer gives a proper 'specifically dated and separately signed affirmative written indication' of his or her desire for such insurance, there may be no further inquiry as to whether the customer's election to obtain the insurance was truly voluntary and not required by the creditor. Whether a customer desired such insurance is a question of fact, which can only be answered by reference to all the circumstances of a particular transaction. Inquiry into these circumstances is, of course, not foreclosed by the presence of a customer's signature on an insurance authorization.

And in FRB Letter No. 1286 (March 21, 1978), 5 *Cons. Cred. Guide* (CCH) ¶31,777, FRB staff noted:

> While the customer's signature on a document would be some evidence of voluntariness, of course, it would not conclusively establish that the insurance was not required. Any number of collateral acts or practices by a creditor could negate the apparently affirmative nature of the customer's election to purchase insurance.
>
> * * * * * * *
>
> Routine inclusion of the insurance premium in the preparation of the credit documents . . . might be evidence that the creditor had created the impression that the insurance was a condition of the extension of credit.

Since we are in accord with these FRB Staff Opinions and since, as respondents acknowledge, such opinion letters are entitled to great weight with respect to the proper interpretation of Regulation Z, *Philbeck* v. *Timmers Chevrolet,* 499 F.2d 971, *reh'g den.,* 502 F.2d 1167 (5th Cir. 1974), we decline to modify our decision.

Finally, respondents call to our attention the Fifth Circuit's recent decision in *Hayslip* v. *Dunlop Chevrolet Co.,* 560 F.2d 192 (5th Cir.

1977), which holds that the absence of a date in the insurance authorization section of a disclosure statement signed by a borrower is not a TILA violation, so long as the correct date is inserted at the top of the loan agreement. We had held that USLIFE's practice of not always separately dating the insurance authorization did constitute an independent violation of TILA. Opinion at 21. Examination of the *Hayslip* opinion and a most unusual set of circumstances convince us to alter our decision.

The key provision is Section 226.4(a)(5)(ii) of Regulation Z, which describes the nature of the indication that a consumer must give if he or she desires insurance coverage. This case was briefed and argued by both complaint counsel and respondents on the assumption that subparagraph read:

> Any customer desiring such insurance coverage gives *specifically* dated and separately signed affirmative written indication of such desire after receiving written disclosure . . . [emphasis added]

The administrative law judge tried the case on this understanding as well. And the official printing of Regulation Z by the Board of Governors of the Federal Reserve System (as amended to March 23, 1977) also uses this language.

On closer examination, however, and after consideration of the *Hayslip* opinion, we have determined that the correct and authentic version of Section 226.4(a)(5)(ii) employs the word "specific" in lieu of the word "specifically." The initial Federal Register printing of this section, 34 FR 2002 (February 11, 1969) uses "specific," as does the current compilation of the Register in the Code of Federal Regulations, 12 C.F.R. 226.4(a)(5)(ii) (as amended to January 1, 1977). Research discloses that no published amendment has changed the language to read "specifically."

This seemingly uneventful semantic distinction necessitates a change in our determination, notwithstanding that we believe that public policy considerations suggest the wisdom of adherence to our original position. The Fifth Circuit's opinion in *Hayslip* places great weight on the fact that the word "specific" must modify "indication", rather than "dated," so that the proper reading of Section 226.4(a)(5)(ii) is that there must be a "specific . . . indication," the nature of which is that it shall be "dated and separately signed."[2] The draftsmen of Section 226.4(a)(5)(ii) could have placed the word

[2] In our earlier opinion, we had placed considerable weight on the fact that the subparagraph used the word "specifically" (which could only have modified "dated," not "indication"). Indeed, FRB staff had stressed the identical point in several opinion letters. *See, e.g.*, FRB Letter No. 398 (August 26, 1970) [1969–1974 Transfer Binder] *Cons. Cred. Guide* (CCH) §30,576, and FRB Letter No. 1163 (March 16, 1977) [1974–1977 Transfer Binder] *Cons. Cred. Guide* (CCH) ¶31,556. We had also noted that separate dating has the virtue of providing a means to ascertain whether insurance was authorized before being included in the credit contracts. The latter factor alone,

(Continued)

"separately" in front of the word "dated," suggesting thereby that both the date and the signature must distinctly appear on the authorization form, but they did not. Application of a variety of maxims of construction, including *expressio unius est exclusio alterius,* compels us, under the circumstances, to hold that Regulation Z does not require that a separate date appear on the insurance authorization, so long as the correct date otherwise appears on the same form.

Our disposition of this issue, however, does not necessitate any change in the order to cease and desist. As a remedial measure addressed to respondents' other violations of TILA, Regulation Z, and the FTC Act, we have ordered that respondents utilize a separate form of Voluntary Insurance Election, see Attachment A to the cease and desist order, upon which consumers may indicate their desire or lack thereof to purchase insurance. Since this form is distinct from the loan agreement itself, the date on the loan papers cannot be assumed to carry over to the insurance form. This case is thus distinguishable from *Hayslip, supra,* and from *Porter* v. *Household Finance Corp. of Columbus,* 385 F. Supp. 336 (S.D. Ohio 1974) and *In re Warren,* 387 F. Supp. 1395 (S.D. Ohio 1975), which were discussed in our earlier opinion. Opinion at 22. Accordingly, no change in the order is required.[3]

III.

Respondents' final contentions can be dealt with quickly. First, they object that paragraphs 4, 5, and 6 of the order are overbroad. These provisions enjoin respondents from failing to disclose accurately the finance charge and annual percentage rate on consumer loans (¶¶4,5) and from failing to otherwise make the disclosures required by related Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z (¶6). These issues are not new and respondents had ample opportunity to address them during the course of the trial and on appeal to the Commission. Suffice it to say, as we have previously noted, Opinion at 34, these fencing-in provisions are justified given their integral relationship to the requirements of Regulation Z which were found to have been violated in this case. *See also Security Industrial Loan Association,* 90 F.T.C. 186, 219 (1977).

Next, respondents contend that the cease and desist order imposes liability upon respondents' employees, who were not named as party

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however, while a salient policy consideration, cannot sustain our original holding, in light of the actual language of Section 226.4(a)(5)(ii).

[3] Respondents have, however, called to our attention a typographical error in paragraph 2 of the order to cease and desist. The word "Failing," which begins paragraph 2 of the order, should be deleted from that line and inserted as the first word in subparagraph (a) of paragraph 2. An appropriate order is annexed.

respondents and whose work may be unrelated to the sale of insurance. It does not. While the order addresses respondents' employees and representatives, and directs that they cease and desist from certain unlawful practices conducted on behalf of and for the benefit of the named respondents, liability for violations of the order (even by employees) is limited to the named corporate respondents, their successors and assigns.

Lastly, respondents urge upon us a due process objection, the essence of which seems to be an expression of their dissatisfaction with the administrative law process. In response, it will suffice to note that no allegations of actual or apparent impropriety have been made by respondents, and a review of the record reveals none. Each of the participants in an administrative law proceeding has well defined roles, none of which were transgressed here. For example, neither the Commission, nor any member thereof, investigated this case, acted as complaint counsel, or conferred with those who did after issuance of the complaint. The procedures undertaken in this matter were those established by the Administrative Procedure Act, 5 U.S.C. 500, *et seq. See FTC* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968). Accordingly, respondents' objection is without basis in law.

IN THE MATTER OF

AUSTRALIAN LAND TITLE, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2928. Complaint, Sept. 14, 1978 — Decision, Sept. 14, 1978

This consent order, among other things, would require a Los Angeles, Calif. seller of undivided interests in Australian land to cease advertising, selling, transferring, or collecting payments on such land. Additionally, the firm is required to return all payments received on or after July 1, 1977; pay property taxes and other charges levied against the tracts as they become due; and provide consumer redress to eligible parties.

Appearances

For the Commission: *Edward D. Steinman.*

For the respondents: *Foster G. Mori, Roush, Mori, Welch & Steiner,* Phoenix, Arizona for Australian Land Title, Ltd., *Miles W. Kirkpatrick, Caswell O. Hobbs, Morgan, Lewis & Bockius,* Washington, D.C. for Safeguard Industries, Inc. and *Daniel C. Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C. for Morlan International, Inc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Australian Land Title, Ltd., Safeguard Industries, Inc., and Morlan International, Inc., corporations, (hereinafter referred to as respondents) have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its Complaint stating its charges in that respect.

PARAGRAPH 1. Respondent Australian Land Title, Ltd. (hereinafter sometimes referred to as "ALT") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, as of 1970, with its principal office and place of business located at 9060 Santa Monica Boulevard, Los Angeles, California. Prior to 1970 there was a predecessor California corporation which did business under the same name.

ALT or its predecessor until 1973 was engaged in the business of acquiring undeveloped land in Western Australia and contracting with representatives to advertise, offer for sale, and sell undivided

interests as tenancies in common in such land to purchasers in the States and Territories of the United States, and in foreign nations.

ALT, through representatives, sold such undivided interests in land by use of standard form contracts, whereby purchasers agreed to pay monthly installments over a term of years. ALT retains legal title to each such undivided interest until final payment is made on the contract of purchase. Purchasers do not have any rights or incidents of ownership, other than equitable interests, in the property until fulfillment of the obligations imposed by the installment contract.

Purchasers pay ALT substantial sums of money in consideration for such undivided interests. In most cases, purchasers also pay interest during the contract term on the unpaid balance owing on the contract. ALT continues to collect and receive monies paid on many such contracts.

In the course of its business, ALT directly or indirectly has communicated and is communicating with purchasers both orally or in writing.

PAR. 2. Respondent Safeguard Industries, Inc. (hereinafter sometimes referred to as "Safeguard"), is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 630 Park Ave., King of Prussia, Pennsylvania.

In February 1970 Safeguard acquired ALT's predecessor and formed ALT, a wholly-owned subsidiary, as a successor corporation. Effective December 27, 1972, Safeguard sold ALT to Morlan International, Inc. (hereinafter sometimes referred to as "Morlan") in return for shares of stock in Morlan and other valuable consideration.

PAR. 3. Respondent Morlan International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Philmont Ave. and Byberry Road, Philadelphia, Pennsylvania.

PAR. 4. ALT's volume of business in the sale of land in Western Australia is substantial and its acts and practices, as set forth herein, are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of its business as aforesaid, ALT sold or caused to be sold, 30 parcels of land in Western Australia by creating 77 or more undivided interests in each such parcel and, until 1973, selling such interests as tenancies in common to purchasers, whose identities for the most part were unknown to each

other, and who were located throughout the States and Territories of the United States, and in foreign nations.

PAR. 6. Under applicable Australian law, which is determinative of the rights of cotenants of this land, all incidents of ownership in land held as tenancies in common are shared communally by all contenants. No individual or group of contenants has the power to bind or prejudicially affect the rights of other contenants by contracting with third persons concerning the common property, to encumber the estate, or to take any other action with regard to the subject parcel, including sale, without the unanimous agreement of the contenants or judicial order.

PAR. 7. By creating so many tenancies in common in each parcel, and by selling the tenancies to purchasers, whose identities were often unknown to each other, in different states, territories and countries without providing a means of managing, developing or disposing of the land, ALT made it virtually impossible for the land to be sold, or beneficially used, regardless of its value or the existence of an interested buyer. Nevertheless, ALT has collected and is continuing to collect and receive payments from such purchasers.

Therefore, the creation and sale of, and the collection and receipt of payments for such undivided interests, as alleged in Paragraphs Five through Seven, were and are unfair acts or practices.

PAR. 8. In the further course and conduct of the aforesaid business, purchasers of undivided interests in land in Western Australia have been induced to pay substantial sums of money without disclosure having been made to such purchasers of the aforesaid detrimental legal and practical effects of purchasing undivided interests in real property. Such undisclosed material facts, if known, would have affected, in many instances, the purchasers' decisions to enter into or continue to perform under their contracts for purchase.

The failure to disclose such material facts as alleged above is unfair or deceptive.

PAR. 9. In the further course and conduct of its aforesaid business, ALT has used contractual provisions which provided that (1) defaulting purchasers forfeit all payments previously paid to ALT under the contract and (2) upon default ALT is released from all obligations.

Upon default, ALT has received payments in excess of its actual damages and has in most instances refused to refund such excess payments. Therefore, ALT's collection and retention of payments in excess of its actual damages imposes a penalty upon defaulting purchasers and such acts or practices as alleged were and are unfair.

PAR. 10. The aforementioned failure to disclose material facts, and

the unfair practices have had the tendency and capacity to induce a substantial portion of the purchasing public into purchasing a substantial number of undivided interests in land in Western Australia and into continuing to make payments for such undivided interests.

PAR. 11. The aforementioned acts and practices, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Australian Land Title, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 9060 Santa Monica Boulevard, Los Angeles, California.

Respondent Safeguard Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, and with its office and principal place of business located at 630 Park Ave., King of Prussia, Pennsylvania.

Respondent Morlan International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Philmont Ave. and Byberry Road, Philadelphia, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For the purpose of this order, the following definitions apply, unless otherwise specified herein:

A. "Respondents" mean Australian Land Title, Ltd. ("ALT"), Morlan International, Inc., ("Morlan") and Safeguard Industries, Inc., ("Safeguard") and include their successors and assigns.

B. "Tract" means each parcel of land located in Western Australia identified in Appendix A.

C. "Sales Agreement" means any agreement entered into by ALT or any agent, representative or subsidiary of ALT for the sale of any undivided interest (tenancy in common) in any Tract.

D. "Purchaser" means any person or entity that entered into any Sales Agreement, or the person or entity that received the purchaser's interest in any Sales Agreement by transfer, assignment, inheritance, or otherwise, or the person or entity, that purchased an interest in a Tract other than from any respondent or its representatives or agents, but shall not include any person or entity, other than one has made all Purchase Payments, whose last Purchase Payment pursuant to any Sales Agreement was received by ALT prior to January 1, 1977, or who has arbitrated, settled, released or litigated to final judgment all claims and rights relating to the purchase of an interest in a Tract.

E. "Defaulter" means any person or entity that entered into any Sales Agreement, or the person or entity that received the purchaser's interest in any Sales Agreement by transfer, assignment, inheritance, or otherwise, or the person or entity that purchased an interest in a Tract other than from any respondent or its representatives or agents, whose last Purchase Payment pursuant to any Sales Agreement was received by ALT on or after

January 1, 1974, but before January 1, 1977, but does not include any person or entity who has made all purchase payments or any Defaulter who has arbitrated, settled, released or litigated to final judgment all claims and rights relating to purchase of an interest in a Tract.

F. "Net Sales Price" means the gross sales price of any Tract less the seller's customary share of state or local sales or transfer taxes, transfer of title fees, and brokerage fees (provided that a broker has in fact been used and that his fees are not more than the prevailing rate for comparable services in Western Australia); no deduction from gross sales price shall be made for attorneys' fees, sellers' pro rata share of property taxes, payoff of mortgages or other liens or charges against the land, cost of appraisal, advertising costs or court costs associated with a judicial proceeding, or other costs of sale.

G. "Purchase Payments" means all sums including downpayments, and periodic payments of principal and interest paid pursuant to any Sales Agreement and dated and received by ALT prior to July 1, 1977.

H. "Purchase Price" means the total purchase price (including interest or finance charges if any) stated in any Sales Agreement.

The acts and practices, prohibitions, affirmative undertakings, requirements and activities subject to this order are those in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

I. *It is ordered,* That ALT, Morlan and Safeguard, directly or indirectly, through any corporation, subsidiary, division, or other device, do forthwith cease and desist from advertising, offering for sale, selling, or transferring any undivided interest in land in Australia to any consumer in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, except as permitted by this order or as otherwise may be permitted by written approval of the Commission. For the purposes of this part, "consumer" shall mean a natural person to whom respondents offer to sell any undivided interest in land or other real property; *provided, however,* that the term "consumer" shall not include a natural person who purchases an interest in land in a single transaction for a sum in excess of $50,000.

II. *It is further ordered,* That ALT:

A. Cease and desist from collecting, directly or indirectly, payments, including principal and interest, due from any Purchaser pursuant to any Sales Agreement and return to any Purchaser, within five (5) days of receipt, any payment received from such Purchaser on or after the date this order becomes final.

B. Return to each Purchaser all payments, including principal and interest, made by such Purchaser pursuant to any Sales Agreement, that were dated and received by ALT, or its representatives or agents, on or after July 1, 1977, but before the date this order becomes final.

C. Cease and desist from cancelling any Sales Agreement of any Purchaser except where permitted or required by Part III of this order.

D. Cease and desist from failing to pay all property taxes, mortgages, liens or charges against any Tract on a timely basis as each becomes due.

III. *It is further ordered,* That ALT, consistent with the procedures set forth below and the laws of Western Australia, sell each Tract and distribute the proceeds. For the purposes of this part, the definition of Purchaser shall not include any person or entity who has sold, devised, assigned, or otherwise transferred his interest in a Tract.

A. Each Tract may be sold by consent of the Purchasers of that Tract or partition and judicial sale pursuant to the laws of Western Australia; *provided, however,* that any sale other than by partition and judicial sale shall be made only with the express consent of the Purchasers whose Sales Agreements account for a majority of the undivided interests in that Tract.

B. On or before two years from the date this order becomes final ALT shall initiate proceedings in the appropriate courts of Western Australia for partition and judicial sale with respect to ten (10) Tracts less the number of Tracts which have been previously sold, or which are already the subjects of partition actions, or which have been excluded pursuant to Paragraph L of this part.

C. On or before three years from the date this order becomes final ALT shall initiate proceedings in the appropriate courts of Western Australia for partition and judicial sale with respect to twenty (20) Tracts less the number of Tracts which have been previously sold, or which are already the subjects of partition actions under Paragraph B of this part as of that date, or which have been excluded under Paragraph L of this part.

D. On or before four years from the date this order becomes final ALT shall initiate proceedings in the appropriate courts of Western Australia for the partition and judicial sale of all Tracts which remain unsold and which are not already the subjects of partition actions under Paragraphs B and C of this part as of that date, or which have not been excluded under Paragraph L of this part.

E. ALT shall pursue all such actions for partition and judicial

sale pursuant to Paragraphs B-D of this Part as expeditiously as possible consistent with the laws and judicial procedures of Western Australia. ALT shall inform the court of the provisions of Part III of this order at the time any proceeding for partition and judicial sale of a Tract is commenced, and shall provide a copy of Part III of this order if the court agrees to accept the order *in camera.*

F. All Tracts shall be sold and the proceeds distributed within five (5) years from the date this order becomes final. *Provided, however,* the Commission shall extend the period as to any particular Tract where ALT can establish to the satisfaction of the Commission that a partition action with respect to such Tract was brought and pursued as provided by this part, but that sale and distribution of proceeds cannot reasonably be expected to occur within the period. Upon the granting of such an extension, ALT shall file reports with the Commission every six months until sale and distribution of proceeds have been completed, describing the status of such pending proceeding and any measures taken by ALT to conclude such proceeding. ALT shall bear the costs of the sale of any Tract except such costs as may be deducted from the gross sales price as provided in the definition of Net Sales Price.

G. Except as otherwise provided herein, a share of the Net Sales Price of each Tract shall be distributed to each Purchaser of such Tract in proportion to the percentage interest in the Tract set forth in such Purchaser's Sales Agreement. Each Defaulter who, prior to January 1, 1977, paid one-third or more of the Purchase Price set forth in such Defaulter's Sales Agreement shall receive a cash payment, to be distributed from the remaining proceeds of the Net Sales Price, such payment to be based on the proportion of the Net Sales Price allocable to the percentage interest in the Tract set forth in such Defaulter's Sales Agreement multiplied by the percentage of the Purchase Price actually paid by such Defaulter. *Provided, however,* that any distribution to a Purchaser who is not a citizen or resident of the United States, its territories, or the District of Columbia shall be paid to such Purchaser in an amount equal to the total of his Purchase Payments, and any remainder shall be paid to ALT in an amount equal to the unpaid balance of the Purchase Price, and thereafter any remainder shall be paid to such Purchaser. Provided further that no Defaulter shall receive from the distribution provided for herein an amount in excess of the total of his Purchase Payments less the distribution provided for in Paragraph B of Part IV of this order. ALT shall be entitled to the balance of the Net Sales Price remaining after distribution of proceeds to Purchasers and Defaulters under this part.

H. Distributions from the Net Sales Price resulting from the sale of each Tract shall be made to the Purchasers and Defaulters of that Tract within sixty (60) days after the receipt of such proceeds by ALT, except at such other time as the Purchasers may consent to in accordance with Paragraph I(ii) of this part or as may be ordered by a court in a proceeding for partition and judicial sale of any Tract.

I. Any Tract may be sold on terms which provide that the buyer will pay the purchase price in installments, or that any payment by the buyer will be deferred for a period in excess of 120 days after the date the sale is consummated, provided that (i) ALT shall nevertheless distribute to the Purchasers and Defaulters of the Tract, as provided in Paragraph G of this part, an amount equal to the Net Sales Price (not including interest) within sixty (60) days after the sales transaction is consummated, or (ii) ALT shall have first obtained the express consent of the Purchasers whose Sales Agreements account for a majority of the undivided interests in the Tract to the terms of the sale and to distribution of the proceeds of the sale within a specified period exceeding 120 days after the date the sale is consummated; *provided, however,* ALT shall distribute proceeds received from the installment sale of any Tract in accordance with Paragraph G of this part within sixty (60) days of the receipt of each installment, and *provided further* that in the event of any default by any buyer, ALT will notify the Commission and promptly initiate proceedings for partition and judicial sale of such Tract.

J. ALT shall not solicit the consent of any Purchaser to any sale of a Tract or any terms of sale without first having obtained, within six (6) months prior to the solicitation, an appraisal from an appraiser licensed in Western Australia who, prior to December 31, 1977, shall not have been employed, retained or otherwise associated with any Respondent, and without having adequately and accurately disclosed to all Purchasers of the Tract whose current addresses have been identified pursuant to the procedures set forth in Part V of this order (i) the name, address and business of a proposed buyer or buyers; (ii) the nature and extent of any prior or existing relationship—including overlapping ownership interests or business dealings—between the buyers and any of the Respondents; (iii) what efforts, if any, have been made to sell the Tract on cash terms or more favorable terms of sale (including efforts to obtain a higher price or shorter pay-out) than that offered by the buyers; (iv) what other offers have been made for the Tract; (v) any appraised value of the Tract made within the six month period, and the date of each such appraisal; (vi) the minimum price and conditions upon which

the Tract would be sold to any buyer; (vii) that if the Purchasers whose Sales Agreements account for a majority of the undivided interests in the Tract do not consent to such sale, ALT remains obligated to sell the Tract, by partition and judicial sale or otherwise, within five (5) years of the date this order becomes final.

K. Respondents shall not, directly or indirectly, purchase or acquire any Tract, from any Purchaser, except as follows:

1. In disposing of any Tract through partition and judicial sale, any Respondent may purchase such Tract only if (i) both the Court administering such sale and the Commission are notified at least thirty (30) days in advance of sale of such Respondent's intention to purchase and the terms of the purchase and (ii) such Respondent reports to the Commission, within sixty (60) days after any such purchase, the amount paid by the Respondent and provides the Commission with such other relevant information concerning the sale as the Commission may request.

2. In disposing of any Tract by consent of the Purchasers of the Tract, any Respondent may purchase such Tract only if (i) within six (6) months prior to such purchase an appraisal shall have been obtained from an appraiser licensed in Western Australia who, prior to December 31, 1977, shall not have been employed, retained or otherwise associated with any Respondent, (ii) the purchase price paid by the Respondent is not less than the appraised value of the Tract, (iii) the Respondent shall have disclosed to the Purchasers the information set forth in Paragraph J of this part, (iv) the Respondent, at least thirty (30) days in advance notifies the Commission of its intention to purchase and provides to the Commission a copy of the appraisal, (v) the Respondent reports to the Commission within sixty (60) days after sale the amount paid by the Respondent and furnishes such other relevant information regarding the sale as the Commission may request.

3. Except as otherwise may be permitted by written approval of the Commission, no Respondent may purchase the individual interest of a Purchaser in a Tract unless such Purchaser

(a) has executed a written document acknowledging receipt of the letter required by Paragraph A of Part IV of this order and declining to dispose of his interest in the manner provided therein, or

(b) is represented by legal counsel, either individually or as a member of a class in a class action which has been filed in state or federal court.

L. Notwithstanding Paragraphs A-K of this part, if the Purchasers whose Sales Agreements account for a majority of the undivided interests in a Tract expressly consent to retain their interests in the

Tract and to forego permanently disposition of the Tract pursuant to Part III of this order, the Commission shall entertain a petition to that end. Such a petition shall set forth sufficient information to demonstrate:

1. The procedure used to ascertain that Purchasers whose Sales Agreements account for a majority of the undivided interests in the Tract have expressly consented to forego disposition of the Tract pursuant to Part III of this order, and the results of such procedure.

2. The risks, benefits, and burdens of such continued ownership in the Tract and the procedures used to ensure that Purchasers were adequately and accurately informed of such information prior to expressing their consent.

3. That prior to any Purchaser's expression of consent, an appraisal of the Tract was obtained from an appraiser (licensed in Western Australia and who, prior to December 31, 1977, had not been employed, retained or otherwise associated with any Respondent) and such appraisal was provided to the Purchasers in the Tract;

4. That adequate provision has been made for Purchasers to dispose of the Tract in the future;

5. That any Purchaser who does not concur in the majority decision was informed of such Purchaser's right to institute, and the required procedure for instituting, an action for judicial partition or sale;

6. That, for the purposes of Parts 4 and 5 of this paragraph, adequate provision has been made to enable Purchasers who hold only equitable rights in the Tract to exercise full rights of ownership in the Tract.

If the Commission is satisfied that the prerequisites of this paragraph have been met, and that there is no countervailing public interest to be served by rejection of the petition, the Commission shall grant the petition.

M. The provisions of this Part regarding sale of the Tracts and distribution of the proceeds are subject to the laws of Western Australia, and to any judicial decrees or orders thereunder; *provided, however,* that to the extent that any Respondent might otherwise have rights in connection with the sale of any Tract, or to the proceeds thereof, different from those provided herein, it has waived such rights and shall proceed according to the terms of this order.

IV. *It is further ordered,* That ALT make cash payments to Purchasers and Defaulters who are citizens or residents of the

United States, its territories, or the District of Columbia, in accordance with the following procedures:

A. Within sixty (60) days after this order becomes final, ALT shall mail, in accordance with the procedures set forth in Part V of this order, two (2) copies of the letter set forth in Appendix B to all such Purchasers and two (2) copies of the letter set forth in Appendix C to all such Defaulters. *Provided, however,* with prior approval of the Commission, appropriate modifications or deletions may be made in letters to be sent to Purchasers or Defaulters whose rights under this order are different from those delineated in the letters set forth in Appendices B and C. Enclosed with each pair of letters shall be a postage-prepaid return envelope for the return of the release form.

B. The amount to be offered to each eligible Purchaser and Defaulter, as indicated in the letter to such Purchaser or Defaulter, shall be the percentage of $2,000,000 equal to the percentage that the total Purchase Payments made by that Purchaser or Defaulter is of the total Purchase Payments made by all eligible Purchasers and Defaulters. Moreover, any Purchaser who purchased an interest in a Tract other than from ALT or its representatives or agents (transferee Purchaser), shall participate in the foregoing payment provided, in calculating the amount of the payment to be made, any consideration paid by a transferee Purchaser to a transferor Purchaser shall, if the transferee Purchaser has first furnished to ALT adequate documentation of such Purchaser's purchase of the interest and the amount paid therefor, be treated as a deduction from the Purchase Payments of the transferor Purchaser and treated as an addition to the Purchase Payments of the transferee Purchaser (in no event, however shall a transferee Purchaser be credited with total Purchase Payments in excess of the total Purchase Payments paid to ALT for such interest.)

C. In calculating Purchase Payments, ALT shall attempt to reconcile with its records any response to the letters required by Paragraph A of this part that contest the accuracy of those records.

D. ALT shall make payments to each such Purchaser and Defaulter who shall have elected to participate by tendering the release set forth in Appendices B and C in a total amount equal to the amount calculated pursuant to Paragraphs B and C of this Part. The first payment shall be made no later than two-hundred and forty (240) days after the date this order becomes final, with subsequent payments to be made at least annually over a period not to exceed forty-eight (48) months from the date of the first payment. The payments will be made to each such Purchaser or Defaulter in equal installments, except that the first payment may be larger than

the succeeding payments and the last payment will include any additional amounts due by reason of the recalculation provided for in Paragraph C of this Part.

E. Seven years after the date on which the letters required by Paragraph A of this part shall have been mailed, ALT shall distribute an additional payment in the following circumstance. If, as of such date, less than $1,500,000 shall have been distributed pursuant to this part, and if as of such date no class action litigation against any of the Respondents shall be pending on behalf of any eligible Purchaser or Defaulter, ALT shall distribute to all Purchasers and Defaulters who shall have tendered the release provided in Appendices B and C the balance of $1,500,000 less such amounts as, subsequent to the date this order becomes final, shall have been paid pursuant to any arbitration, settlement, release, litigation, or judgment relating to the purchase of any interest in a Tract. In the event that any class action litigation is pending on such date, this distribution shall be deferred until ninety (90) days after such action is dismissed or settled, or any judgment thereon is satisfied, and the amount of such distribution shall be reduced by such amounts as may have been paid pursuant to such settlement, litigation or judgment. Payment of the amounts to be paid under this paragraph shall be made to each Purchaser and Defaulter in the same proportion as payments under Paragraph B of this part; *provided, however,* that no Purchaser or Defaulter shall receive from this distribution an amount in excess of the total of his Purchase Payments less the distributions provided for in this part.

V. *It is further ordered,* That:

A. Any mailings or communications required by Parts III and IV of this order shall be by first-class mail, postage-prepaid and address correction requested, directed to each Purchaser and Defaulter at the most recent address for such Purchaser or Defaulter contained in ALT's files.

B. Sixty (60) days after the mailing required by Paragraph A of Part IV of this order, ALT shall make a second mailing of such letters by certified first-class mail, postage-prepaid, address correction requested, return-receipt requested with delivery to addressee only, to all Purchasers and Defaulters, directed to their most recent addresses contained in the ALT files, except those Purchasers and Defaulters whose first mailing was returned undelivered or who have tendered either the release or the election not to participate.

C. Within twenty (20) days after return to ALT of any undelivered letter mailed pursuant to Paragraphs A or B or within thirty (30) days after mailing any letter mailed pursuant to Paragraph B of

this part for which no return receipt has been received, ALT shall attempt to obtain a current or more recent address for the Purchaser or Defaulter to whom such letter was addressed by requesting the Purchaser's or Defaulter's current mailing address from any relative or representative of the Purchaser or Defaulter whose address appears in ALT's files by sending a communication by first-class mail, postage-prepaid and address correction requested, directed to the most recent address for such relative or representative appearing in ALT's files, and by requesting a current address for the Purchaser or Defaulter from a credit reporting agency located nearby the most recent address for the Purchaser or Defaulter appearing in ALT's files, the current or more recent address to be provided by the credit reporting agency within a reasonable time after the request. If a current or more recent address is received through these procedures, a copy of the appropriate letter required by Paragraph A of Part IV of this order shall be sent within ten (10) days after receipt of the new address to the Purchaser or Defaulter at the new address by certified first-class mail, postage-prepaid, address correction requested, return-receipt requested and delivery to addressee only.

D. After completion of the procedures set forth in Paragraphs A-C of this part, ALT shall maintain such records as will disclose as to each Purchaser and Defaulter, whether such Purchaser or Defaulter (i) signed a release, (ii) elected not to participate, (iii) did not respond to the letter, but received it as evidenced by a signed certified mail return-receipt, (iv) was not reached by any mailing; and the most recent address in ALT's files or obtained through the procedures set forth in Paragraph C of this part.

E. If at any time prior to the fulfillment of the obligations imposed by this order, ALT learns of the current address of any Purchaser or Defaulter whose letters were returned undelivered or from whom a record of receipt was not obtained, ALT shall send such Purchaser or Defaulter the letters required by certified first class mail, postage-prepaid, address correction requested, return-receipt requested and delivery to addressee only, and such Purchaser or Defaulter shall be entitled to the benefits provided under Parts III and IV of this order under the terms and conditions provided therein. Except as provided in Paragraph F of this part, ALT shall not thereafter bear any affirmative duty to seek out Purchasers or Defaulters.

F. All payments or distributions to Purchasers or Defaulters pursuant to Parts III or IV of this order shall be sent by first-class mail, postage-prepaid, address correction requested to the most

recent address for each Purchaser or Defaulter appearing in ALT's files. If any such payment is returned undelivered, ALT shall employ the procedures set forth in Paragraph C of this part in an effort to obtain a current address for such Purchaser or Defaulter.

G. If, at the time of the last payment to eligible Purchasers and Defaulters pursuant to paragraph D of Part IV of this order, less than $1,500,000 shall have been distributed pursuant to Part IV of this order, ALT shall inform such Purchasers and Defaulters that they may receive an additional payment pursuant to paragraph E of Part IV of this order and request such Purchasers and Defaulters to advise ALT of any change of address.

VI. *It is further ordered,* That Respondents shall, subsequent to the date this order becomes final, for a period of six (6) years or until one year after Respondents have complied fully with all parts of this order, whichever is later, or such shorter period as the Commission may approve in writing:

A. Grant any duly authorized representative of the Federal Trade Commission access to and the right to copy any records required to be maintained by this order.

B. Maintain records which show the efforts taken to insure continuing compliance with the terms and provisions of this order, including but not limited to the following:

1. All records used by any Respondent in determining whether any person or entity is a Purchaser or Defaulter, as each term is defined in this order.

2. All records used by any Respondent in determining the amount of money due any Purchaser or Defaulter pursuant to Parts II, III, and IV of this order.

3. All records evidencing that any Purchaser or Defaulter has arbitrated, settled, released or litigated to final judgment all claims and rights relating to the purchase of an interest in a Tract and that such Purchaser or Defaulter has received payment pursuant to such arbitration, settlement, release or litigation.

4. All records relating to the purchase or transfer of any Purchaser's undivided interest in a Tract, including all documents filed with or issued by any Australian court pursuant to Part III of this order.

5. Copies of all written communications between any Respondent and any Purchaser or Defaulter, including any communication which is returned to any Respondent as nondeliverable by the U.S. Postal Service, except those between counsel for a Respondent and counsel for such Purchaser or Defaulter.

C. Obtain prior approval by the Commission of any written

communication to any Purchaser or Defaulter which is initiated by any Respondent pursuant to Paragraphs I or K of Part III of this order, except for any communication written pursuant to Paragraph K(3)(b). Such Respondent shall provide to the Commission such relevant information within its possession, custody or control as the Commission may request to evaluate any such communication. If, within 20 days after mailing such communication to the Commission, the Respondent has received no written notice that the Commission has determined that the communication fails to conform with the provisions of this order or that the Commission needs additional time to evaluate the communication, the Respondent may send the communication. Otherwise the Commission shall approve the communication or indicate the changes necessary for such approval within 30 days after the submission of such correspondence or as soon thereafter as possible.

D. Send, within 3 days after mailing, copies to the Commission of any written communication, the substance of which has not previously been approved or authorized by the Commission, to any Purchaser or Defaulter which (a) interprets or defines the obligations imposed by this order, or (b) is written in response to any inquiry from any Purchaser or Defaulter relating to a written communication from any Respondent initiated pursuant to Paragraphs I, K or L of Part III of this order.

VII. *It is further ordered,* That:

A. Morlan shall be responsible for ALT's compliance with the provisions of this order and shall be liable for any final judgment against ALT for violating any provision of this order.

B. Safeguard shall provide such funds on a timely basis as are required for compliance with the provisions of this order.

C. In the event that ALT is sold, assigned or otherwise disposed of, the agreement for such disposition shall contain a provision requiring the purchaser or assignee to assume the obligations imposed on ALT under this order.

D. In the event that the Commission determines that ALT has failed to comply, or has become incapable of complying, with any provision of this order, and if the required action is not taken within 30 days after written notice to ALT and Safeguard of such determination, or in the event that the Commission is enjoined, stayed or otherwise prohibited from enforcing any provision of this order against ALT or Morlan by a bankruptcy court, Safeguard shall assume all obligations (including obligations that have become due, but have not been fulfilled by ALT) remaining to be fulfilled by ALT under this order; *provided, however,* that Safeguard shall not be

liable for civil penalties by reason of ALT's failure to fulfill such obligations prior to the date of such written notice; and provided further that, in any event, Safeguard shall fulfill the obligations remaining unfulfilled under Part III of this order either on the dates set forth in such part or twelve (12) months from the date of such written notice, whichever time period is longer. After Safeguard assumes the unfulfilled obligations under this order by operation of this paragraph, and upon submission of a petition by Safeguard, the Commission will review each deadline for any unfulfilled obligation and will extend, where appropriate, any deadline which has been established by Safeguard as imposing, under the prevailing circumstances, an unreasonable hardship or burden in its application to Safeguard; *provided, however,* the Commission need not extend any deadline when extension of the deadline would be contrary to the public interest. The Commission will respond to such petition within 45 days of its submission by Safeguard or as soon thereafter as is possible. Nothing contained in this paragraph shall be construed as otherwise limiting the Commission's authority to pursue against any noncomplying Respondent any action for such noncompliance with this order.

E. ALT shall immediately transfer to Safeguard ownership of one undivided interest in each Tract.

F. Each Respondent herein shall, within ninety (90) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the applicable provisions of this order and, commencing 180 days after filing the initial report, shall file semiannual reports thereafter until it has complied fully with all parts of this order.

G. For the purposes of this order, the "Commission" shall include, and all notices, reports, and requests for approval shall be dirceted to, the Director of the Bureau of Consumer Protection, or his designee, or successor.

H. Should any duty required to be performed on a day certain under this order fall upon a non-business day, such duty may be performed on the next following business day.

I. The Commission may extend any deadline contained in this order for good cause shown, and such extension shall not be unreasonably withheld.

J. Each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiary

corporation or any other change in the corporation which may affect compliance obligations arising out of this order.

APPENDIX A

Listing of parcels of land in Western Australia owned by ALT in which consumers currently hold undivided interests.

Tract Number	Consisting of Victoria Location or Portions of Victoria Locations			Also Identified as Lot No.
I	10293			
II	10295			
III	10144			
IV	10609			
V	10574			
VI	10148			
VII	9907			
VIII	10006			
IX	4484			
X	4485			
XI	4584			
XII	3511			
XIII	10001			
XIV	2718			
XV	2545,	2709		9
XVI	9790			13
XVII	1924,	952,	1458	14
XVIII	2798,	1924,	1458	
	2317,	9721		15
XIX	2798,	9791,	2737	16
XX	755,	9791,	2737,	
	8348,	2798		17
XXI	755,	695,	2798	18
XXII	956,	476,	1258,	
	2170			19
XXIII	1258,	2169		20
XXIV	1258,	2169,	907	21
XXV	907,	2169		22
XXVI	2169,	2718		23
XXVII	2169,	2170,	2718	
	476			24
XXVIII	476,	2170,	2718	25
XXIX	2718,	2170		26
XXX	2718			27

APPENDIX B

[ALT Letterhead]

(Name) (Address) (City and State)

Re: Sale of Land in Western Australia and Cash Payments

Dear (Name):

Australian Land Title, Ltd., ("ALT") has entered into an Agreement with the

Federal Trade Commission which provides certain benefits for which you are eligible. The Agreement basically provides (a) for the sale of the tract of land in which you hold an interest within five years, (b) that no further payments need be made by you, (c) that those payments dated and received by the company on or after July 1, 1977, will be returned to you, (d) that your sales agreement will be treated as paid in full—you will receive a full share in the proceeds of the sale of the land in accord with your sales agreement, and (e) a cash payment will be made to you each year for the next five years upon your signing the Release set forth below agreeing to release any claims that you may have arising out of your acquisition of the undivided interest in land located in Western Australia.

Our records show that you hold a _____ % interest in [*description of land*], and that as of June 30, 1977, $ _____ was paid to ALT on your contract. If your records conflict with any of this information please notify us at once, and provide copies of whatever documents you may have which will help in resolving any conflicts. As mentioned above, all payments you made to ALT after July 1, 1977, are being returned to you.

Sale of Land. ALT will, within the next five years, arrange for the sale of the land in Australia in which you hold an interest. You will receive a share of the net sales price of the land based upon the percentage interest set forth in your sales agreement. It is not possible at this time to estimate the price for which the land will be sold. Before this happens, however, you will be sent complete details concerning how the land will be sold.

Discontinue Payments. ALT is not collecting any further payments due under your contract for the purchase of an undivided interest in land in Western Australia. Accordingly, do not send any additional payments to ALT. ALT will send back to you any payments you made which were dated and recevied by ALT on or after July 1, 1977. This will not affect your right to participate in the proceeds from the sale of the land in which you hold an undivided interest. You will receive the full share set forth in your sales agreement.

Eligibility for Cash Payment. You are eligible to receive a cash payment from ALT. Cash payments will be made only to purchasers who agree in writing to release any claims they may have arising out of the sale of undivided interests in land in Western Australia. A copy of this letter containing the Release is being provided for your signature. If you sign the Release, you will receive $ _____ which will be paid in five installments. The first payment will be made by [*date*], and will be in the amount of $ _____. The four subsequent payments will be made annually. In order to receive the cash payment you must sign the Release and return it in the enclosed postage-paid envelope. You may wish to consult an attorney to determine your rights before signing the Release, and you should be aware that the Federal Trade Commission has expressed no opinion as to whether you should sign the Release.

Even if you do not wish to sign the Release and receive the cash payment, you will still receive your share of the proceeds of the sale of the land in which you have purchased an interest. You should not make any additional payments to ALT and ALT will return any payments you have made since July 1, 1977. If you do not wish to release all claims and participate in the cash payment, sign the statement "I DO NOT WISH TO PARTICIPATE IN THE CASH PAYMENT" and return the copy in the enclosed postage-paid envelope.

Please sign and return the copy of this letter as soon as possible and in no event later than 60 days. Please note your current address and keep us advised of any future change of address, so that we may send you further information, as well as future payments. If you have any questions about this letter, please write to us at once.

Sincerely,

[*Title*]
Australian Land Title, Ltd.

RELEASE

In consideration of the cash payments described above, totaling $ _____, I hereby release Australian Land Title, Ltd., Safeguard Industries, Inc., and Morlan International, Inc., their subsidiaries, predecessors, and affiliates, and their officers, directors, employees, and agents from any and all claims, known or unknown, that I may have against any of them in connection with my purchase of an interest in land as described above.

[*Date*] [*Signature*]

Remember, you must sign and date the above Release and return this letter to receive the Cash Payments.

I DO *NOT* WISH TO PARTICIPATE IN THE CASH PAYMENT.

[*Date*] [*Signature*]

APPENDIX C

[ALT Letterhead]

(Name)
(Address)
(City and State)

Re: Eligibility for Cash Payments

Dear (Name):

Australian Land Title, Ltd., ("ALT") has entered into an Agreement with the Federal Trade Commission which provides certain benefits for which you are eligible.

Cash Payments. Cash payments will be made to persons whose last payment on their contracts was received by ALT on or after January 1, 1974, but not later than December 31, 1976. According to our records, your last payment to ALT was made on [*date*]. At this time you had paid $ _____ on your contract for a _____ % interest in the following land: [*description of land*]. If your records conflict with any of this information, please notify us at once, and provide copies of whatever documents you may have which will help in resolving any conflicts.

Based on the foregoing, you are eligible for a cash payment of $ _____ from ALT. You can receive this amount only if you agree to release any claims you may have arising out of the sale of undivided interests in land in Western Australia. A copy of this letter containing the Release is being provided for your signature.

The payment will be made in five installments. The first payment will be made by [*date*], and will be in the amount of $ _____. The four subsequent payments will be made annually. In order to receive the cash payment you must sign the RELEASE and return it in the enclosed postage-paid envelope. You may wish to

consult an attorney to determine your rights before signing the Release, and you should be aware that the Federal Trade Commission has expressed no opinion as to whether you should sign the Release.

If you do not wish to release all claims and participate in the cash payment, sign the statement "I DO NOT WISH TO PARTICIPATE IN THE CASH PAYMENT" and return the copy in the enclosed postage-paid envelope.

Sale of Land. Even if you do not agree to release all claims and participate in the cash payment described above, you will still be eligible to receive a payment from the proceeds of the sale of the land in which you contracted to purchase an interest. The amount of this payment cannot now be estimated, since it will be based on the sales price of the land, as well as the amount you paid on your contract.

Whether or not you choose to participate in the cash payments, the amount you will receive is limited to the amount that you have paid to ALT. In no event will you receive more than the amount you paid.

Please sign and return the copy of this letter as soon as possible and in no event later than 60 days. Please note your current address, and advise us of any future change of address, so that we may send you further information, as well as future payments.

If you have any questions about this letter, please write us at once.

Sincerely,
Australian Land Title, Ltd.

By

RELEASE

In consideration of the cash payments described above, totaling $ _____, I hereby release Australian Land Title, Ltd., Safeguard Industries, Inc., and Morlan International, Inc., their subsidiaries, predecessors, and affiliates, and their officers, directors, employees, and agents from any and all claims, known or unknown, that I may have against any of them in connection with my purchase of an interest in land as described above.

[*Date*] [*Signature*]

Remember, you must sign and date the above Release and return this letter to receive the Cash Payments.

I DO *NOT* WISH TO PARTICIPATE IN THE CASH PAYMENT.

[*Cash*] [*Signature*]

IN THE MATTER OF

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2930. Complaint, Sept. 19, 1978 — Decision, Sept. 19, 1978

These four (4) consent orders, among other things, require four (4) Boston, Massachusetts insurance companies to cease interlocking directors by allowing any individual to sit on their boards who is simultaneously sitting on the board of any of the other boards or of any other competitive firms. The consent orders additionally require the companies to initiate prescribed procedures designed to eliminate interlocking directorates, and to submit detailed compliance reports to the Commission annually for a five-year period.

Appearances

For the Commission: *Patrick J. Quinlan* and *Alan Proctor.*

For the respondents: *Andrew C. Hartzell, Jr.* for John Hancock Mutual Life Insurance Co., *John S. Kingdon* for New England Mutual Life Insurance Co. and *Edwin M. Zimmerman* for State Mutual Life Assurance Co. and Liberty Mutual Insurance Co., Boston, Mass.

COMPLAINT

The Federal Trade Commission having reason to believe that the above-named respondents have violated Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof, would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definitions apply in this complaint:

(a) "John Hancock" means John Hancock Mutual Life Insurance Company, the respondent, and all of its insurance company subsidiaries.

(b) "Liberty Mutual" means Liberty Mutual Insurance Company, the respondent, Liberty Mutual Fire Insurance Company and all of their insurance company subsidiaries.

(c) "New England Mutual" means New England Mutual Life Insurance Company, the respondent, and all of its insurance company subsidiaries.

(d) "State Mutual" means State Mutual Life Assurance Company of America, the respondent, and all insurance company members of

"The America Group," including American Variable Annuity Life Assurance Company, The Hanover Insurance Company, Worcester Mutual Insurance Company, and The Beacon Mutual Indemnity Company, and all of their insurance company subsidiaries.

(e) "Subsidiary" of a corporation (parent) means any corporation 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of which is owned or controlled, directly or indirectly, other than as a fiduciary, by such corporation (parent).

(f) "Sister" of a corporation means any corporation of which more than 50 percent of the voting stock (or other indicia of control for non-stock corporations) is directly or indirectly owned or controlled by the same corporation which owns or controls directly or indirectly 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of the subject corporation.

(g) "Insurance company" means any corporation engaged in the underwriting of insurance which is organized and existing as an insurance company under the laws of any state and which files an Annual Statement to Insurance Commissioner in such state or any corporation which has such an insurance company as a subsidiary.

(h) "Lines of insurance" means the lines of business shown in the NAIC Annual Statement to Insurance Commissioner blank forms, as amended from time to time.

(i) "Annual premiums" means the total direct premiums derived by an insurance company from any line of insurance during a calendar year less dividends to policyholders attributable to that line of insurance, and excluding premiums derived from any line of insurance sold to a subsidiary, sister or parent.

PAR. 2. Respondent John Hancock Mutual Life Insurance Company is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. It maintains its principal place of business at John Hancock Place, Boston, Massachusetts and has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 3. Respondent Liberty Mutual Insurance Company is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. It maintains its principal place of business at 175 Berkeley St., Boston, Massachusetts and has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 4. Respondent New England Mutual Life Insurance Company is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. It maintains its principal place of business at 501 Boylston St., Boston, Massachu-

setts and has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 5. Respondent State Mutual Life Assurance Company of America is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. It maintains its principal place of business at 440 Lincoln St., Worcester, Massachusetts and has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 6. Roger C. Damon is a member of the boards of directors of Liberty Mutual Insurance Company and New England Mutual Life Insurance Company. He is also a member of the Finance Committee of New England Mutual Life Insurance Company.

PAR. 7. Thomas J. Galligan, Jr., is a member of the boards of directors of Liberty Mutual Insurance Company and New England Mutual Life Insurance Company. He is also a member of the Finance Committee of New England Mutual Life Insurance Company.

PAR. 8. Richard D. Hill is a member of the boards of directors of Liberty Mutual Insurance Company and John Hancock Mutual Life Insurance Company.

PAR. 9. D. Thomas Trigg is a member of the boards of directors of Liberty Mutual Insurance Company and State Mutual Life Assurance Company of America.

PAR. 10. John Hancock conducts its business in the fifty States of the United States and the District of Columbia. During the calendar year ending December 31, 1975, its business encompassed, but was not limited to, the sale of the following lines of insurance in the following amounts:

Lines of Business	Annual Premiums Written During 1975
Group Accident and Health	407,519,427
Ordinary Life	586,604,681
Group Life	212,735,047
Individual Annuities	5,619,142

PAR. 11. Liberty Mutual conducts its business in the fifty States of the United States and the District of Columbia. During the calendar year ending December 31, 1975, its business encompassed, but was not limited to, the sale of the following lines of insurance in the following amounts:

Lines of Business	Annual Premiums Written During 1975
Fire	6,482,256
Allied Lines	4,561,932
Homeowner's Multiple Peril	56,062,660
Commercial Multiple Peril	21,324,904
Inland Marine	12,081,305
Group Accident and Health	98,410,880
Other Accident and Health	2,924,900
Workmen's Compensation	413,965,016
Other Liability	112,867,361
Auto Liability	271,919,902
Auto Physical Damage	124,330,409
Fidelity	2,157,232
Burglary/Theft	2,025,214
Ordinary Life	5,766,025
Group Life	8,811,364
Individual Annuities	66,331

PAR. 12. New England Mutual conducts its business in the fifty States of the United States and the District of Columbia. During the calendar year ending December 31, 1975, its business encompassed, but was not limited to, the sale of the following lines of insurance in the following amounts:

Lines of Business	Annual Premiums Written During 1975
Group Accident and Health	56,167,752
Ordinary Life	318,329,892
Group Life	21,133,487
Individual Annuities	22,791,633

PAR. 13. State Mutual conducts its business in the fifty States of the United States and the District of Columbia. During the calendar year ending December 31, 1975 its business encompassed, but was not limited to, the sale of the following lines of insurance in the following amounts:

Lines of Business	Annual Premiums Written During 1975
Fire	24,765,253
Allied Lines	10,683,161

Homeowner's Multiple Peril	34,434,834
Commercial Multiple Peril	23,957,896
Inland Marine	6,497,439
Group Accident and Health	50,636,102
Other Accident and Health	4,086,048
Workmen's Compensation	31,998,014
Other Liability	108,356,934
Auto Liability	55,692,894
Auto Physical Damage	41,380,235
Ocean Marine	6,004,993
Aircraft	9,767,027
Surety	2,329,641
Ordinary Life	103,594,266
Group Life	18,621,943
Individual Annuities	1,198,888

PAR. 14. (a) By the nature of their business and the locations of their operations as hereinabove described, Liberty Mutual and New England Mutual are competitors of each other in the sale of insurance, including but not necessarily limited to, the sale of the following lines of insurance: group accident and health, ordinary life, group life, and individual annuities.

(b) The elimination, by agreement or otherwise, of competition between Liberty Mutual and New England Mutual would constitute a violation of the antitrust laws.

PAR. 15. (a) By the nature of their business and the locations of their operations as hereinabove described, John Hancock and Liberty Mutual are competitors in the sale of insurance, including but not necessarily limited to, the sale of the following lines of insurance: group accident and health, ordinary life, group life, and individual annuities.

(b) The elimination, by agreement or otherwise, of competition between John Hancock and Liberty Mutual would constitute a violation of the antitrust laws.

PAR. 16. (a) By the nature of their business and the locations of their operations as hereinabove described, State Mutual and Liberty Mutual are competitors of each other in the sale of insurance, including but not necessarily limited to, the sale of the following lines of insurance: fire, allied lines, homeowner's multiple peril, commercial multiple peril, inland marine, group accident and health, other accident and health, workmen's compensation, other

liability, auto liability, auto physical damage, ordinary life, group life, and individual annuities.

(b) The elimination, by agreement or otherwise, of competition between State Mutual and Liberty Mutual would constitute a violation of the antitrust laws.

PAR. 17. (a) John Hancock, Liberty Mutual, New England Mutual and State Mutual conduct their business, as hereinabove described, in the District of Columbia and in various States of the United States.

(b) John Hancock, Liberty Mutual, New England Mutual and State Mutual engage in "commerce" and conduct their business, including activities involving their boards of directors, so as to have an effect upon "commerce," as the term "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44 and in Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 18. Roger C. Damon's simultaneous membership on the boards of directors of both Liberty Mutual Insurance Company and New England Mutual Life Insurance Company is a violation by Liberty Mutual Insurance Company and New England Mutual Life Insurance Company of Section 8 of the Clayton Act, 15 U.S.C. 21. It is also an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Liberty Mutual Insurance Company and New England Mutual Life Insurance Company.

PAR. 19. Thomas J. Galligan, Jr.'s simultaneous membership on the boards of directors of both Liberty Mutual Insurance Company and New England Mutual Life Insurance Company is a violation by Liberty Mutual Insurance Company and New England Mutual Life Insurance Company of Section 8 of the Clayton Act, 15 U.S.C. 21. It is also an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Liberty Mutual Insurance Company and New England Mutual Life Insurance Company.

PAR. 20. Richard D. Hill's simultaneous membership on the boards of directors of both Liberty Mutual Insurance Company and John Hancock Mutual Life Insurance Company is a violation by Liberty Mutual Insurance Company and John Hancock Mutual Life Insurance Company of Section 8 of the Clayton Act, 15 U.S.C. 21. It is also an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Liberty Mutual

Insurance Company and John Hancock Mutual Life Insurance Company.

PAR. 21. D. Thomas Trigg's simultaneous membership on the boards of directors of both Liberty Mutual Insurance Company and State Mutual Life Assurance Company of America is a violation by Liberty Mutual Insurance Company and State Mutual Life Assurance Company of America of Section 8 of the Clayton Act, 15 U.S.C. 21. It is also an unfair act, practice, or method of competition in or affecting commerce and, therefore, constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by Liberty Mutual Insurance Company and State Mutual Life Assurance Company of America.

DECISION AND ORDER RE RESPONDENT JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent for the purpose of this proceeding only of the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as set forth in said agreement; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and now in conformity with the procedure provided by Section 2.34 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a corporation incorporated under the laws of the Commonwealth of Massachusetts and maintains its principal office at John Hancock Place, Boston, Massachusetts.

2. The Federal Trade Commission has jurisdiction over the

subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That the following definitions shall apply in this order:

(a) "John Hancock" means John Hancock Mutual Life Insurance Company, the respondent, and all of its insurance company subsidiaries.

(b) "Subsidiary" of a corporation (parent) means any corporation 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of which is owned or controlled, directly or indirectly, other than as a fiduciary, by such corporation (parent).

(c) "Sister" of a corporation means any corporation of which more than 50 percent of the voting stock (or other indicia of control for non-stock corporations) is directly or indirectly owned or controlled by the same corporation which owns or controls directly or indirectly 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of the subject corporation.

(d) "Insurance company" means any corporation engaged in the underwriting of insurance which is organized and existing as an insurance company under the laws of any state and which files an Annual Statement to Insurance Commissioner in such state or any corporation which has such an insurance company as a subsidiary.

(e) "Lines of insurance" means the lines of business shown in the NAIC Annual Statement to Insurance Commissioner blank forms, as amended from time to time.

(f) "Annual premiums" means the total direct premiums derived by an insurance company from any line of insurance during a calendar year less dividends to policyholders attributable to that line of insurance, and excluding premiums derived from any line of insurance sold to a subsidiary, sister or parent.

II

It is further ordered, That respondent, its successors and assigns, do forthwith cease and desist from permitting any individual to serve as a director or to be a nominee for director of respondent if such individual is or would be at the same time a director or nominee for director of Liberty Mutual Insurance Company so long as respondent and Liberty Mutual Insurance Company are in competition in the underwriting of one or more lines of insurance.

III

It is further ordered, That respondent, its successors and assigns, do as follows:

(a) Thirty days after the date upon which this order, as finally issued by the Commission, is served on the respondent, the respondent shall report in writing to the Commission that no director of the respondent nor any nominee for director of the respondent is then a director or nominee for director of Liberty Mutual Insurance Company. Thereafter, annually for a period of five (5) years beginning on October 15, 1978, and ending on October 15, 1982, the respondent shall report in writing to the Commission that no director of the respondent, nor any nominee for director of the respondent, serves as a director, or is then a nominee for director, of an insurance company which has, pursuant to the reports and review prescribed in Paragraph III(b), been disclosed and determined to be in competition with John Hancock, or that all legally available steps to remove or prevent such persons from service on the Board of respondent have been taken.

(b) Prior to and as the basis for making the annual report required in Paragraph III(a) hereto, the respondent shall do the following:

(1) The respondent shall require a written report to the respondent from each director and each nominee for director, identifying each other corporation as to which said director or nominee for director is also a director or nominee for director, and, if such corporation is an insurance company, listing each line of insurance underwritten by each such insurance company for which, during the immediately preceding calendar year, annual premiums received by that company exceeded $2,000,000. When requesting such report, the respondent shall furnish each director and nominee for director a copy of the complaint and order in this proceeding.

(2) The respondent shall determine by reviewing *Best's Insurance Reports, Fire and Casualty* and *Best's Insurance Reports, Life,* published by Alfred M. Best Company, Inc., and consulting appropriate personnel within John Hancock, whether the lists of lines of insurance reported to the respondent pursuant to Paragraph III(b)(1) hereof are complete and accurate and shall use reasonable diligence to determine whether any line of insurance required to be reported pursuant to Paragraph III(b)(1) hereof is in competition with any line of insurance underwritten by John Hancock for which, during the immediately preceding calendar year, annual premiums received by John Hancock exceeded $2,000,000.

(c) In the event that the process of review required by Paragraph

III(b) hereof discloses the existence of competition in any line of insurance between John Hancock and any other insurance company identified in any report furnished pursuant to Paragraph III(b)(1), the respondent shall prevent the service as director or the nomination or election as director of any person who remains as a director or nominee for director of that insurance company, provided that the Respondent shall be allowed a reasonable period of time from the date of such disclosure within which so to prevent such service, nomination or election by taking such steps as are legally available to it to comply with this provision.

(d) In the event that any director or nominee for director of the respondent fails or refuses to provide in good faith the report required by Paragraph III(b)(1) hereof, the respondent shall prevent such person from remaining as a director or nominee for director of the respondent, provided that the respondent shall be allowed a reasonable period of time from the date of such failure or refusal within which so to prevent such person from so remaining by taking such steps as are legally available to it to comply with this provision.

(e) The respondent's report to the Commission, which is to be made on an annual basis as described in Paragraph III(a) hereof, shall contain the written reports of the individual directors and nominees for director required by Paragraph III(b)(1) hereof and a copy of the respondent's written request to such directors and nominees for director and shall set forth the manner and form in which the respondent has complied with this order.

IV

It is further ordered, That the provisions of Paragraph III hereof shall not apply where the corporation referred to is included in the definition of John Hancock above or is John Hancock's (1) parent, (2) sister, or (3) subsidiary.

Decision and Order re Respondent Liberty Mutual Insurance Company

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent for the purpose of this proceeding only of the jurisdictional facts set forth in the aforesaid draft of compalint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as set forth in said agreement; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and now in conformity with the procedure provided by Section 2.34 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a corporation incorporated under the laws of the Commonwealth of Massachusetts and maintains its principal office at 175 Berkeley St., Boston, Massachusetts.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That the following definitions shall apply in this order:

(a) "Liberty Mutual" means Liberty Mutual Insurance Company, the respondent, Liberty Mutual Fire Insurance Company and all of their insurance company subsidiaries.

(b) "Subsidiary" of a corporation (parent) means any corporation 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of which is owned or controlled, directly or indirectly, other than as a fiduciary, by such corporation (parent).

(c) "Sister" of a corporation means any corporation of which more than 50 percent of the voting stock (or other indicia of control for non-stock corporations) is directly or indirectly owned or controlled by the same corporation which owns or controls directly or indirectly 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of the subject corporation.

(d) "Insurance company" means any corporation engaged in the underwriting of insurance which is organized and existing as an

insurance company under the laws of any state and which files an Annual Statement to Insurance Commissioner in such state or any corporation which has such an insurance company as a subsidiary.

(e) "Lines of insurance" means the lines of business shown in the NAIC Annual Statement to Insurance Commissioner blank forms, as amended from time to time.

(f) "Annual premiums" means the total direct premiums derived by an insurance company from any line of insurance during a calendar year less dividends to policyholders attributable to that line of insurance, and excluding premiums derived from any line of insurance sold to a subsidiary, sister or parent.

II

It is further ordered, That respondent, its successors and assigns, do forthwith cease and desist from permitting any individual to serve as a director or to be a nominee for director of respondent if such individual is or would be at the same time a director or nominee for director of John Hancock Mutual Life Insurance Company or New England Mutual Life Insurance Company or State Mutual Life Assurance Company of America so long as respondent and any of the said companies of which said individual is or would at the same time be a director or nominee for director are in competition in the underwriting of one or more lines of insurance.

III

It is further ordered, That respondent, its successors and assigns, do as follows:

(a) Thirty days after the date upon which this order, as finally issued by the Commission, is served on the respondent, the respondent shall report in writing to the Commission that no director of the respondent nor any nominee for director of the respondent is then a director or nominee for director of John Hancock Mutual Life Insurance Company or New England Mutual Life Insurance Company or State Mutual Life Assurance Company of America. Thereafter, annually for a period of five (5) years beginning on October 15, 1978, and ending on October 15, 1982, the respondent shall report in writing to the Commission that no director of the respondent, nor any nominee for director of the respondent, serves as a director, or is then a nominee for director, of an insurance company which has, pursuant to the reports and review prescribed in Paragraph III(b), been disclosed and determined to be in competition with Liberty Mutual, or that all legally

available steps to remove or prevent such persons from service on the Board of respondent have been taken.

(b) Prior to and as the basis for making the annual report required in Paragraph III(a) hereto, the respondent shall do the following:

(1) The respondent shall require a written report to the respondent from each director and each nominee for director, identifying each other corporation as to which said director or nominee for director is also a director or nominee for director, and, if such corporation is an insurance company, listing each line of insurance underwritten by each such insurance company for which, during the immediately preceding calendar year, annual premiums received by that company exceeded $2,000,000. When requesting such report, the respondent shall furnish each director and nominee for director a copy of the complaint and order in this proceeding.

(2) The respondent shall determine by reviewing *Best's Insurance Reports, Fire and Casualty* and *Best's Insurance Reports, Life,* published by Alfred M. Best Company, Inc., and consulting appropriate personnel within Liberty Mutual, whether the lists of lines of insurance reported to the respondent pursuant to Paragraph III(b)(1) hereof are complete and accurate and shall use reasonable diligence to determine whether any line of insurance required to be reported pursuant to Paragraph III(b)(1) hereof is in competition with any line of insurance underwritten by Liberty Mutual for which, during the immediately preceding calendar year, annual premiums received by Liberty Mutual exceeded $2,000,000.

(c) In the event that the process of review required by Paragraph III(b) hereof discloses the existence of competition in any line of insurance between Liberty Mutual and any other insurance company identified in any report furnished pursuant to Paragraph III(b)(1), the respondent shall prevent the service as director or the nomination or election as director of any person who remains as a director or nominee for director of that insurance company, provided that the respondent shall be allowed a reasonable period of time from the date of such disclosure within which so to prevent such service, nomination or election by taking such steps as are legally available to it to comply with this provision.

(d) In the event that any director or nominee for director of the respondent fails or refuses to provide in good faith the report required by Paragraph III(b)(1) hereof, the respondent shall prevent such person from remaining as a director or nominee for director of the respondent, provided that the respondent shall be allowed a reasonable period of time from the date of such failure or refusal

within which so to prevent such person from so remaining by taking such steps as are legally available to it to comply with this provision.

(e) The respondent's report to the Commission, which is to be made on an annual basis as described in Paragraph III(a) hereof, shall contain the written reports of the individual directors and nominees for director required by Paragraph III(b)(1) hereof and a copy of the respondent's written request to such directors and nominees for director and shall set forth the manner and form in which the respondent has complied with this order.

IV

It is further ordered, That the provisions of Paragraph III hereof shall not apply where the corporation referred to is included in the definition of Liberty Mutual above or is Liberty Mutual's (1) parent, (2) sister, or (3) subsidiary.

Decision and Order re Respondent New England Mutual Life Insurance Company

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent for the purpose of this proceeding only of the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as set forth in said agreement; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and now in conformity with the procedure provided by Section 2.34 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a corporation incorporated under the laws of the Commonwealth of Massachusetts and maintains its principal office at 501 Boylston St., Boston, Massachusetts.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That the following definitions shall apply in this order:

(a) "New England Mutual" means New England Mutual Life Insurance Company, the respondent, and all of its insurance company subsidiaries.

(b) "Subsidiary" of a corporation (parent) means any corporation 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of which is owned or controlled, directly or indirectly, other than as a fiduciary, by such corporation (parent).

(c) "Sister" of a corporation means any corporation of which more than 50 percent of the voting stock (or other indicia of control for non-stock corporations) is directly or indirectly owned or controlled by the same corporation which owns or controls directly or indirectly 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of the subject corporation.

(d) "Insurance company" means any corporation engaged in the underwriting of insurance which is organized and existing as an insurance company under the laws of any state and which files an Annual Statement to Insurance Commissioner in such state or any corporation which has such an insurance company as a subsidiary.

(e) "Lines of insurance" means the lines of business shown in the NAIC Annual Statement to Insurance Commissioner blank forms, as amended from time to time.

(f) "Annual premiums" means the total direct premiums derived by an insurance company from any line of insurance during a calendar year less dividends to policyholders attributable to that line of insurance, and excluding premiums derived from any line of insurance sold to a subsidiary, sister or parent.

II

It is further ordered, That respondent, its successors and assigns, do forthwith cease and desist from permitting any individual to serve as a director or to be a nominee for director of respondent if such

individual is or would be at the same time a director or nominee for director of Liberty Mutual Insurance Company so long as respondent and Liberty Mutual Insurance Company are in competition in the underwriting of one or more lines of insurance.

III

It is further ordered, That respondent, its successors and assigns, do as follows:

(a) Thirty days after the date upon which this order, as finally issued by the Commission, is served on the respondent, the respondent shall report in writing to the Commission that no director of the respondent nor any nominee for director of the respondent is then a director or nominee for director of Liberty Mutual Insurance Company. Thereafter, annually for a period of five (5) years beginning on October 15, 1978, and ending on October 15, 1982, the respondent shall report in writing to the Commission that no director of the respondent, nor any nominee for director of the respondent, serves as a director, or is then a nominee for director, of an insurance company which has, pursuant to the reports and review prescribed in Paragraph III(b), been disclosed and determined to be in competition with New England Mutual, or that all legally available steps to remove or prevent such persons from service on the Board of respondent have been taken.

(b) Prior to and as the basis for making the annual report required in Paragraph III(a) hereto, the respondent shall do the following:

(1) The respondent shall require a written report to the respondent from each director and each nominee for director, identifying each other corporation as to which said director or nominee for director is also a director or nominee for director, and, if such corporation is an insurance company, listing each line of insurance underwritten by each such insurance company for which, during the immediately preceding calendar year, annual premiums received by that company exceeded $2,000,000. When requesting such report, the respondent shall furnish each director and nominee for director a copy of the complaint and order in this proceeding.

(2) The respondent shall determine, by reviewing *Best's Insurance Reports, Fire and Casualty* and *Best's Insurance Reports, Life,* published by Alfred M. Best Company, Inc., and consulting appropriate personnel within New England Mutual, whether the lists of lines of insurance reported to the respondent pursuant to Paragraph III(b)(1) hereof are complete and accurate and shall use reasonable diligence to determine whether any line of insurance required to be reported pursuant to Paragraph III(b)(1) hereof is in competition

with any line of insurance underwritten by New England Mutual for which, during the immediately preceding calendar year, annual premiums received by New England Mutual exceeded $2,000,000.

(c) In the event that the process of review required by Paragraph III(b) hereof discloses the existence of competition in any line of insurance between New England Mutual and any other insurance company identified in any report furnished pursuant to Paragraph III(b)(1), the respondent shall prevent the service as director or the nomination or election as director of any person who remains as a director or nominee for director of that insurance company, provided that the respondent shall be allowed a reasonable period of time from the date of such disclosure within which so to prevent such service, nomination or election by taking such steps as are legally available to it to comply with this provision.

(d) In the event that any director or nominee for director of the respondent fails or refuses to provide in good faith the report required by Paragraph III(b)(1) hereof, the respondent shall prevent such person from remaining as a director or nominee for director of the respondent, provided that the respondent shall be allowed a reasonable period of time from the date of such failure or refusal within which so to prevent such person from so remaining by taking such steps as are legally available to it to comply with this provision.

(e) The respondent's report to the Commission, which is to be made on an annual basis as described in Paragraph III(a) hereof, shall contain the written reports of the individual directors and nominees for director required by Paragraph III(b)(1) hereof and a copy of the respondent's written request to such directors and nominees for director and shall set forth the manner and form in which the respondent has complied with this order.

IV

It is further ordered, That the provisions of Paragraph III hereof shall not apply where the corporation referred to is included in the definition of New England Mutual above or is New England Mutual's (1) parent, (2) sister, or (3) subsidiary.

Decision and Order re Respondent State Mutual Life Assurance Company of America

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to

present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent for the purpose of this proceeding only of the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as set forth in said agreement; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and now in conformity with the procedure provided by Section 2.34 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a corporation incorporated under the laws of the Commonwealth of Massachusetts and maintains its principal office at 440 Lincoln St., Worcester, Massachusetts.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

I

It is ordered, That the following definitions shall apply in this order:

(a) "State Mutual" means State Mutual Life Assurance Company of America, the respondent, and all insurance company members of "The American Group," including American Variable Annuity Life Assurance Company, The Hanover Insurance Company, Worcester Mutual Insurance Company, and The Beacon Mutual Indemnity Company, and all of their insurance company subsidiaries.

(b) "Subsidiary" of a corporation (parent) means any corporation 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of which is owned or controlled, directly or indirectly, other than as a fiduciary, by such corporation (parent).

(c) "Sister" of a corporation means any corporation of which more than 50 percent of the voting stock (or other indicia of control for non-stock corporations) is directly or indirectly owned or controlled

by the same corporation which owns or controls directly or indirectly 50 percent or more of the voting stock (or other indicia of control for non-stock corporations) of the subject corporation.

(d) "Insurance company" means any corporation engaged in the underwriting of insurance which is organized and existing as an insurance company under the laws of any state and which files an Annual Statement to Insurance Commissioner in such state or any corporation which has such an insurance company as a subsidiary.

(e) "Lines of insurance" means the lines of business shown in the NAIC Annual Statement to Insurance Commissioner blank forms, as amended from time to time.

(f) "Annual premiums" means the total direct premiums derived by an insurance company from any line of insurance during a calendar year less dividends to policyholders attributable to that line of insurance, and excluding premiums derived from any line of insurance sold to a subsidiary, sister or parent.

II

It is further ordered, That respondent, its successors and assigns, do forthwith cease and desist from permitting any individual to serve as a director or to be a nominee for director of respondent if such individual is or would be at the same time a director or nominee for director of Liberty Mutual Insurance Company so long as respondent and Liberty Mutual Insurance Company are in competition in the underwriting of one or more lines of insurance.

III

It is further ordered, That respondent, its successors and assigns, do as follows:

(a) Thirty days after the date upon which this order, as finally issued by the Commission, is served on the respondent, the respondent shall report in writing to the Commission that no director of the respondent nor any nominee for director of the respondent is then a director or nominee for director of Liberty Mutual Insurance Company. Thereafter, annually for a period of five (5) years beginning on October 15, 1978, and ending on October 15, 1982, the respondent shall report in writing to the Commission that no director of the respondent, nor any nominee for director of the respondent, serves as a director, or is then a nominee for director, of an insurance company which has, pursuant to the reports and review prescribed in Paragraph III(b), been disclosed and determined to be in competition with State Mutual, or that all legally available

steps to remove or prevent such persons from service on the Board of respondent have been taken.

(b) Prior to and as the basis for making the annual report required in Paragraph III(a) hereto, the respondent shall do the following:

(1) The respondent shall require a written report to the respondent from each director and each nominee for director, identifying each other corporation as to which said director or nominee for director is also a director or nominee for director, and, if such corporation is an insurance company, listing each line of insurance underwritten by each such insurance company for which, during the immediately preceding calendar year, annual premiums received by that company exceeded $2,000,000. When requesting such report, the respondent shall furnish each director and nominee for director a copy of the complaint and order in this proceeding.

(2) The respondent shall determine by reviewing *Best's Insurance Reports, Fire and Casualty* and *Best's Insurance Reports, Life,* published by Alfred M. Best Company, Inc., and consulting appropriate personnel within State Mutual, whether the lists of lines of insurance reported to the respondent pursuant to Paragraph III(b)(1) hereof are complete and accurate and shall use reasonable diligence to determine whether any line of insurance required to be reported pursuant to Paragraph III(b)(1) hereof is in competition with any line of insurance underwritten by State Mutual for which, during the immediately preceding calendar year, annual premiums received by State Mutual exceeded $2,000,000.

(c) In the event that the process of review required by Paragraph III(b) hereof discloses the existence of competition in any line of insurance between State Mutual and any other insurance company identified in any report furnished pursuant to Paragraph III(b)(1), the respondent shall prevent the service as director or the nomination or election as director of any person who remains as a director or nominee for director of that insurance company, provided that the respondent shall be allowed a reasonable period of time from the date of such disclosure within which so to prevent such service, nomination or election by taking such steps as are legally available to it to comply with this provision.

(d) In the event that any director or nominee for director of the respondent fails or refuses to provide in good faith the report required by Paragraph III(b)(1) hereof, the Respondent shall prevent such person from remaining as a director or nominee for director of the respondent, provided that the respondent shall be allowed a reasonable period of time from the date of such failure or refusal

within which so to prevent such person from so remaining by taking such steps as are legally available to it to comply with this provision.

(e) The respondent's report to the Commission, which is to be made on an annual basis as described in Paragraph III(a) hereof, shall contain the written reports of the individual directors and nominees for director required by Paragraph III(b)(1) hereof and a copy of the respondent's written request to such directors and nominees for director and shall set forth the manner and form in which the respondent has complied with this order.

IV

It is further ordered, That the provisions of Paragraph III hereof shall not apply where the corporation referred to is included in the definition of State Mutual above or is State Mutual's (1) parent, (2) sister, or (3) subsidiary.

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Sept. 21, 1978

ORDER DENYING AS MOOT RESPONDENTS' MOTIONS TO COMPEL PRODUCTION OF DOCUMENTS SUBMITTED TO THE COMMISSION ON PROPOSED INJUNCTION AND FOR DISCOVERY OF ALL MEMORANDA, DOCUMENTS, COMMUNICATIONS OR CONTACTS WITH THE COMMISSION REGARDING PROPOSED INJUNCTION

Administrative Law Judge Lewis F. Parker has certified to the Commission respondents' motions to compel production of documents submitted to the Commission on an injunction proposed by complaint counsel, and for discovery of all memoranda, documents, communications or contacts with the Commission regarding the proposed injunction. The administrative law judge has recommended that all *ex parte* communications regarding the merits of this case which staff may have made to the Commission with respect to the proposed injunction be released.

The matter is moot. By minute of July 31, 1978, the Commission directed that all such *ex parte* communications from the staff, which contain statements of fact and mixed statements of fact and law which appear to relate to facts in issue, be placed on the public record. By reason of a clerical oversight, this was not done; however, the Commission has been informed that the pertinent materials have since been placed on the public record, pursuant to its July 31, 1978 directive. This procedure fully conforms to Rules of Practice Section 4.7(f), which governs communications, like these, that are *not* prohibited by Section 4.7(b). Accordingly, inasmuch as the Commission is unaware of any further *ex parte* communications on this subject, either written or oral,

It is ordered, That respondents' motions be, and hereby are, denied as moot.

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2929. Complaint, Sept. 26, 1978 — Decision, Sept. 26, 1978

This consent order, among other things, requires a St. Louis, Mo. distributor of footwear, wearing apparel and accessories and its subsidiaries to cease suggesting resale prices for their products; maintaining price fixing agreements; compelling price adherence and exclusive dealings through coercion, and penalizing recalcitrant dealers. The firms are also required to reinstate terminated resellers; and maintain relevant records for a five-year period.

Appearances

For the Commission: *Elliot Feinberg, Richard Gately, Judith K. Braun, Paul Eyre* and *Carole I. Danielson.*

For the respondents: *Ronald L. Aylward, Ephraim Jacobs* and *E.C. Heininger,* St. Louis, Mo.

COMPLAINT

The Federal Trade Commission, having reason to believe that Interco Incorporated, Londontown Corporation, and Queen Casuals, Inc., corporations, hereinafter sometimes referred to as respondents, have violated the provisions of Section 5(a)(1) of the Federal Trade Commission Act, and Sections 2(d), 2(e) and 3 of the Clayton Act, and that a proceeding by it in respect thereof is in the public interest, issues this complaint stating its charges as follows:

RESPONDENTS

PARAGRAPH 1. Respondent Interco Incorporated is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its executive offices located at Ten Broadway, St. Louis, Missouri.

Respondent Londontown Corporation is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal place of business located at Londontown Boulevard, Eldersburg, Maryland.

Respondent Queen Casuals, Inc. is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal place of business located at 10175 Northeast Ave., Philadelphia, Pennsylvania.

PAR. 2. Interco Incorporated is engaged, directly or through its

subsidiaries, in the manufacture, sale, and distribution of various consumer products. Among said products are footwear and wearing apparel bearing trademarks, brands, and names owned by Interco Incorporated, including, but not limited to, "Florsheim" and "Thayer McNeil" footwear, and "London Fog," "Clipper Mist," "Queen Casuals," "Devon" and "College-Town" wearing apparel.

Florsheim Shoe Company and International Shoe Company are operated as divisions of Interco Incorporated. By and through these divisions Interco Incorporated manufactures, distributes, and sells men's, women's and children's footwear.

Interco Incorporated is a substantial nationwide seller of medium-to-high priced dress and casual leather footwear in the United States. Interco Incorporated distributes its footwear products through numerous company-owned outlets as well as through independent retailers.

College-Town and Devon are operated as divisions of Interco Incorporated. By and through these divisions Interco Incorporated manufactures, distributes, and sells wearing apparel.

Londontown Corporation and Queen Casuals, Inc. are wholly-owned subsidiaries of Interco Incorporated. By and through these subsidiaries Interco Incorporated manufactures, distributes, and sells wearing apparel.

In 1976, Interco Incorporated had net sales in excess of $1,000,000,000. Sales of footwear and apparel constituted more than 78 percent of earnings in 1976.

COMMERCE

PAR. 3. Respondents are engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, and are engaged in or their business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

DEFINITIONS

PAR. 4. For the purpose of this complaint, the following definitions shall apply:

(a) *"Dealer"* — any person, partnership, firm, or corporation which engages in the retail sale of footwear and wearing apparel, except a company-owned store.

(b) *"Company-owned store"* — any retail outlet or lease department owned or operated by any of the respondents.

(c) *"Sale period"* — any time during which company-owned stores offer to sell products at prices lower than those in effect during the

usual and ordinary course of business; or, any suggested, authorized, or customary time for selling or advertising footwear or apparel at prices lower than suggested, established, or customary resale prices.

COMPETITION

PAR. 5. Except to the extent that competition has been restrained by reasons of the practices hereinafter alleged, respondents are in competition with other persons, partnerships, or corporations engaged in the manufacturing, offering for sale, sale, or distribution of various products, including but not limited to footwear and wearing apparel.

COUNT I

PAR. 6. The allegations of Paragraphs 1 through 5 are incorporated herein by reference.

PAR. 7. Respondents are engaged and have engaged in the following acts or practices, some of which individually constitute unlawful acts or practices:

(a) Entering into combinations, agreements, or understandings with dealers or prospective dealers to adhere to certain resale prices.

(b) Disseminating price lists and supplements thereto containing suggested resale prices or resale prices in effect at company-owned stores, or otherwise informing dealers of suggested, established, or customary resale prices.

(c) Informing dealers or prospective dealers, by direct or indirect means, that respondents expect or desire such dealers to adhere to certain resale prices.

(d) Entering into combinations, agreements, or understandings with dealers or prospective dealers to adhere to certain sale periods.

(e) Disseminating information regarding sale periods, including the dates of such periods.

(f) Informing dealers or prospective dealers, by direct or indirect means, that respondents expect or desire such dealers to adhere to sale periods.

(g) Withholding allowances or other benefits from dealers who promote respondents' products at prices deviating from suggested, established, or customary resale prices or from prices in effect at company-owned stores.

(h) Identifying dealers who:

(1) Offer for sale or sell respondents' products at prices or terms deviating from established, suggested, or customary resale prices or from prices or terms in effect at company-owned stores; or

(2) Advertise respondents' products at prices or terms deviating from established, suggested or customary resale prices or from prices or terms in effect at company-owned stores; or

(3) Advertise closeout, promotional, clearance or irregular products as having been manufactured by respondents.

(i) Contacting dealers who engage in any of the activities referred to in (h)(1) through (3).

(j) Urging, inducing, persuading, compelling, or coercing dealers to cease engaging in any of the activities referred to in (h)(1) through (3).

(k) Threatening to terminate or terminating certain dealers who engage in any of the activities referred to in (h)(1) through (3).

(l) Granting rebates, credits, benefits, or allowances to dealers who sell respondents' products at suggested, established, or customary resale prices.

(m) Disseminating or assisting in the dissemination of resale price information between or among competing dealers.

(n) Refusing to sell to any existing dealer who will not adhere to certain resale prices or sale periods.

PAR. 8. The capacity, tendency, or effect of the acts and practices of respondents alleged in Count I is, or may be, to:

(a) Maintain, control or establish the prices at which respondents' products are sold; or

(b) Lessen, eliminate, frustrate, reduce, or hinder competition in the sale and distribution of respondents' products; or

(c) Deprive consumers of the benefits of free and open competition.

Therefore, the acts and practices alleged in Count I constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 9. The allegations of Paragraphs 1 through 5 are incorporated herein by reference.

PAR. 10. Interco Incorporated has sold or contracted for the sale of footwear products to certain dealers on the condition, agreement, or understanding that such dealers shall not purchase the products of one or more competitors of Interco Incorporated.

PAR. 11. Interco Incorporated suggests, recommends, advises, persuades, or induces dealers to refrain from selling the footwear products of one or more competitors of Interco Incorporated.

PAR. 12. The capacity, tendency, and effect of the acts and practices of Interco Incorporated alleged in Count II is, or may be, to:

(a) Substantially lessen, hinder, restrain, or suppress competition

in the sale of medium-to-high priced dress or casual leather footwear; or

(b) Exclude or tend to exclude, competitors of Interco Incorporated from selling footwear to a substantial number of dealers.

PAR. 13. Therefore, the acts and practices alleged in Count II violate Section 3 of the Clayton Act and constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act.

COUNT III

PAR. 14. The allegations of Paragraphs 1 through 5 are incorporated herein by reference.

PAR. 15. Interco Incorporated has paid or contracted for the payment of money, goods, or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers in connection with the processing, handling, sale, or offering for sale of its products and Interco Incorporated has not made such payments available on proportionally equal terms to all customers competing with the customers so favored in the sale and distribution of its footwear products.

For example, Interco Incorporated is now granting and has granted advertising allowances to some of its dealers in connection with the opening of additional retail outlets or special promotional activities such as anniversary sales. Said allowances are not and were not made available on proportionally equal terms to all other dealers competing with the dealers so favored in the sale and distribution of its footwear products.

PAR. 16. Interco Incorporated has discriminated in favor of some of its purchasers against other competing purchasers of its products bought for resale by contracting to furnish or furnishing or by contributing to the furnishing of services and facilities connected with the processing, handling, sale, or offering for sale of such products so purchased upon terms or conditions not accorded to all competing footwear purchasers on proportionally equal terms.

For example, Interco Incorporated has provided to some dealers the opportunity to purchase closeout merchandise or to return unsold product inventory.

PAR. 17. Therefore, the acts and practices alleged in Count III violate Sections 2(d) and 2(e) of the Clayton Act and constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office and the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Interco Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at Ten Broadway, St. Louis, Missouri.

Respondent Londontown Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Londontown Boulevard, Eldersburg, Maryland.

Respondent Queen Casuals, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 10175 Northeast Ave., Philadelphia, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions shall apply:

"Reseller" is defined as any person, partnership, firm or corporation which purchases any product from any respondent or any person, partnership, firm or corporation owned or operated by any respondent. "Reseller" shall not include any retail outlet or lease department owned or operated by any respondent.

"Prospective reseller" is defined as any person, partnership, firm or corporation which seeks to purchase any product from a respondent or any person, partnership, firm or corporation owned or operated by any respondent. "Prospective reseller" shall not include any retail outlet or lease department owned or operated by any respondent.

"Resale price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any reseller for pricing any product. Such term includes but is not limited to any suggested, established or customary resale price as well as the retail price in effect at any retail outlet or lease department owned or operated by any respondent.

"Sale period" is defined as any time during which any retail outlet or lease department owned or operated by any respondent offers to sell any product at resale prices lower than those in effect during the usual and ordinary course of business; or any suggested, authorized or customary time for selling or advertising any product at prices lower than suggested, established or customary resale prices.

"Product" is defined as any footwear, apparel, or apparel accessories including but not limited to handbags, belts, gloves, scarves, hats and jewelry.

I

It is ordered, That respondents Interco Incorporated, Londontown Corporation and Queen Casuals, Inc., corporations, their successors and assigns, and respondents' officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, offering for sale, sale, distribution or advertising of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Establishing, exacting assurances to comply with, continuing or enforcing any combination, agreement, understanding or arrangement to fix, establish, control, maintain or enforce, directly or

indirectly, any resale price at which any product is to be sold or advertised by any reseller or prospective reseller.

2. Requiring or coercing any reseller or prospective reseller to establish, maintain, issue, adopt or adhere to any resale price or sale period.

3. For a period of three (3) years from the date of service of this order, orally suggesting or recommending any resale price or sale period to any reseller or prospective reseller. The advertising to consumers of actual resale prices by any retail outlet or lease department owned or operated by any respondent shall not be deemed a violation of this paragraph.

4. For a period of three (3) years from the date of service of this order, communicating in writing any resale price or sale period to any reseller or prospective reseller. The advertising to consumers of actual resale prices by any retail outlet or lease department owned or operated by any respondent shall not be deemed a violation of this paragraph. After this three (3) year period, it shall be clearly stated on the pages of any list, book, advertising, promotional material or other document where any suggested resale price or sale period appears:

THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS].

A respondent shall not, however, suggest resale prices on any tag, ticket or other marking affixed or to be affixed to any product shipped to a reseller.

5. Requiring or soliciting, directly or indirectly, any reseller, prospective reseller, person or firm to report the identity of any reseller who deviates from any resale price or sale period.

6. Communicating with any reseller or prospective reseller concerning its deviation or alleged deviation from any resale price or sale period.

7. Suggesting or requiring that any reseller or prospective reseller refrain from or discontinue advertising any product at a certain resale price.

8. Representing that any action may or will be taken against any reseller if it deviates from any resale price or sale period.

9. Threatening to withhold or withholding advertising allowances or any other assistance, payment, service or consideration from any reseller, or limiting or restricting the eligibility of any reseller to receive such benefits because said reseller advertises or sells at a certain resale price.

10. Making any payment or granting any other consideration or benefit to a reseller because another reseller has sold at a certain resale price.

11. Hindering or precluding the lawful use by a reseller of any brand name of any respondent in conjunction with the sale or advertising of any product at any price.

12. Terminating, suspending, delaying shipments to or taking or threatening any action against any reseller because the reseller has, or was alleged to have, sold or advertised any product at a certain resale price, or because the reseller may engage in any such activity in the future. Provided that each of the respondents retains the right to terminate any reseller for lawful business reasons not inconsistent with this paragraph or any other paragraph of this order.

13. Attempting to secure any promise or assurance from any reseller or prospective reseller regarding the price at which such reseller or prospective reseller will or may advertise or sell any product; or requesting or requiring any reseller or prospective reseller to obtain approval from any respondent for any price at which such reseller or prospective reseller may or will advertise or sell any product.

II

It is further ordered, That respondents, their successors and assigns, and respondents' officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device in connection with the manufacture, offering for sale, sale, distribution or advertising of any footwear product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act, shall forthwith cease and desist from:

1. Entering into, maintaining, preserving or enforcing by refusal to sell, termination or threat thereof or otherwise, any agreement, understanding or arrangement which precludes or prevents a reseller or prospective reseller from stocking or selling a footwear product supplied by anyone other than a respondent or from independently determining the volume of a footwear product to be purchased from such other suppliers.

2. Requiring, coercing or inducing any reseller to cancel orders for or not purchase any footwear product supplied by anyone other than a respondent.

3. Making or contracting to make to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any services or facilities furnished by or through

such customer in connection with the handling, sale or offering for sale of footwear products unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the sale or distribution of such products.

4. Discriminating in favor of any purchaser against any other competing purchaser or purchasers of any footwear product bought for resale by contracting to furnish or furnishing or by contributing to the furnishing of any services or facilities connected with the handling, sale or offering for sale of such products so purchased upon terms not accorded to all competing purchasers on proportionally equal terms.

It is further ordered, That nothing in Part II of this order shall be construed to prevent any respondent from asserting all rights and defenses legally available to a respondent under Section 2 of the amended Clayton Act.

It is further ordered, That in any enforcement action brought to enforce the provisions of Part II of this order, respondents shall assume the burden of proving all such defenses.

III

It is further ordered, That respondents shall:

1. Within sixty (60) days after the date of service of this order, mail under separate cover a copy of either this order or the Federal Trade Commission's news release in this matter to every present reseller of the Florsheim, Devon or College-Town divisions of Interco Incorporated or of the Londontown Corporation or Queen Casuals, Inc. subsidiaries of Interco Incorporated. An affidavit of mailing shall be sworn to by an official of respondents verifying that said mailing was completed.

2. Mail a copy of either this order or the Federal Trade Commission's news release in this matter to every reseller that purchases any product from the Florsheim, Devon or College-Town divisions of Interco Incorporated or from the Londontown Corporation or Queen Casuals, Inc. subsidiaries of Interco Incorporated within five (5) years after the date of service of this order. The mailing required by this paragraph shall occur within thirty (30) days after the first purchase by said reseller.

3. Within thirty (30) days after the date of service of this order distribute a copy of this order to each of their operating divisions and subsidiaries in the United States and to each of their officers, and to sales personnel, sales agents and sales representatives of the Florsheim, Devon and College-Town divisions of Interco Incorporated and of the Londontown Corporation and Queen Casuals, Inc.

subsidiaries of Interco Incorporated engaged in the sale of products to resellers and secure from each entity or person a signed statement acknowledging receipt of said order.

4. Upon written request received within six (6) months from the date of service of this order, reinstate any reseller terminated by a respondent since January 1, 1974 for failing to maintain a certain resale price or sale period, provided that such reseller meets the credit requirements applied by respondents in the retention of resellers.

5. Notify the Commission at least thirty (30) days prior to any proposed change in any respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

6. For a period of five (5) years from the date of service of this order maintain complete business records which fully disclose the manner and form of respondents' compliance with the order, including but not limited to any records referring or relating in whole or in part to:

(a) any communication between any respondent and any reseller or prospective reseller relating to the price at which any reseller or prospective reseller is selling, proposes to sell, is advertising or proposes to advertise any product;

(b) the termination or suspension of any reseller for any reason;

(c) the refusal to deal with any prospective reseller for any reason; or

(d) any request for reinstatement pursuant to Part III Paragraph (4) of this order.

The records required by this paragraph shall be made available to Commission staff upon reasonable notice.

7. File with the Commission within sixty (60) days and within one hundred and eighty (180) days after service of this order reports, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

KRAFTCO CORPORATION, ET AL.

FINAL ORDER ON REMAND, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 9035. Complaint,[1] *June 17, 1975 — Decision, Oct. 4, 1978*

This order on remand from the Second Circuit Court of Appeals is identical to that issued by the Commission on January 11, 1977, 42 FR 10979, corrected at 13820, 89 F.T.C. 46, and requires the SCM Corporation, a New York City producer of margarine, edible oils and barbecue sauce, among other things, to cease seating on its board of directors, any individual who is simultaneously serving on the board of the Kraftco Corporation, or any other competitive company.

ORDER ON REMAND

FINAL ORDER

This matter has been heard by the Commission upon remand from the Second Circuit Court of Appeals. The Commission, for the reasons stated in the accompanying opinion, has determined that an order to cease and desist should be entered. Therefore,

It is ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

The following definitions shall apply in this order:

"Subsidiary" of SCM means any corporation, 50 percent or more of the voting stock of which is owned or controlled, directly or indirectly, by SCM.

"Parent" of SCM means any corporation which owns or controls, directly or indirectly, 50 percent or more of the voting stock of SCM.

"Sister" of SCM means any subsidiary of a parent of SCM.

1. *It is ordered,* That respondent SCM Corporation and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns (so long as Kraftco and SCM Corporation compete in the production or sale of any product or service), or

[1] For complaint, see 88 F.T.C. 362.

serves at the same time as a director of any other corporation (other than a subsidiary, parent, or sister of SCM) which competes with SCM Corporation in the production or sale of any product or service; or

(b) fails to submit to SCM Corporation any statement required by Paragraph Two of this order to be obtained by SCM.

2. *It is further ordered,* That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, SCM Corporation shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced or sold by, each corporation which the director or nominee then serves as a director, or has been nominated to serve as a director at the time of the statement.

The requirements of this paragraph shall not apply to elections of directors occurring after five years from the effective date of this order, nor shall directors or nominees be required to list products or services of subsidiaries, sisters, or parents of SCM Corporation.

Nothing in this paragraph shall be construed to relieve respondent of its obligation under paragraph 1(a) hereto due to any error or omission contained in any written statement received pursuant to this paragraph.

3. *It is further ordered,* That within forty-five (45) days of the effective date of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph during the first five (5) years. Nothing in this paragraph shall relieve SCM Corporation of its obligation to comply with Paragraphs One and Four of this order once it is no longer required to submit reports of compliance to the Commission.

4. *It is further ordered,* That SCM Corporation shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*

This matter is before the Commission upon remand from the Second Circuit Court of Appeals. The Court affirmed the Commission's earlier determination that respondent SCM has violated Section 8 of the Clayton Act (15 U.S.C. 18) by virtue of its maintenance of a common director, Richard C. Bond, with a competitor, Kraftco Corporation. *SCM Corporation* v. *Federal Trade Commission,* 565 F. 2d 807 (2d Cir. 1977). However, the Court remanded the matter to the Commission for further consideration as to whether there exists some cognizable danger of recurrent violation, a finding that the Court deemed a necessary predicate to any imposition by the Commission of an order to cease and desist. On remand, both sides have filed briefs and reply briefs on this question.

In its original decision in this matter, the Commission, as had the administrative law judge, noted several factors that it believed warranted entry of an order in this case. Among these were the fact that the violation in question had been longstanding in nature, involved more than $80 million in sales by SCM, and was terminated only following issuance of a complaint by the Commission. *See* 89 F.T.C. 46, 65 (1977). Having made these observations, however, we then went on to state (in addressing SCM's arguments that no order should enter) that

> SCM's position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future such occurrences, and that *the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order.* . . . (89 F.T.C. at 66, emphasis added.)

The underlined wording met with the disapproval of the Court of Appeals, which was concerned that the Commission may have applied an incorrect standard and shifted the burden of proof in determining the need for an order.

Our phraseology was plaintly infelicitous. What we intended by our words to convey was that record evidence concerning the nature of the violation and the circumstances surrounding it demonstrated to us the need for an order. In the face of such evidence, it was incumbent upon respondent to rebut, if it could, complaint counsel's showing that an order should enter.

Having once again reviewed the evidence and carefully considered the submissions of the parties, we adhere to our earlier conclusion that an order is necessary. We find that there is plainly a cognizable danger of recurrent violation of Section 8 of the Clayton Act in this case. Our conclusion is based upon the facts that the law violation which occurred persisted for a period of 7 years, involved markets in which SCM and its interlocked competitor made over $300 million in sales (of which $80 million were SCM's), and was halted only after intervention by the Commission (in this instance, after issuance of the complaint). In our view, these considerations show that SCM acted without adequate attention to its obligations under the law. Having acted in this fashion in the past, and given that it continues to do business and elect directors, we believe there is cognizable danger that SCM will again neglect to prevent the election and service of an interlocking director absent an order to deter it. See *SEC* v. *Commonwealth Chem. Securities, Inc.*, 574 F.2d 90, 100 (2d Cir. 1978).

In its briefs before the Commission, SCM contends that the grounds cited by complaint counsel, and upon which the Commission relies in finding a danger of recurrent violation, do not constitute "affirmative evidence" in support of the conclusion reached. We disagree.[1] As the Court of Appeals properly reminded us, the mere occurrence of a law violation, however trivial, technical, short-lived, and speedily corrected may not, in and of itself, dictate the need for remedial action. The Commission's holding in its earlier opinion could fairly have been read to say otherwise. We do believe, however, that with corporations as with individuals, past conduct is probative of future behavior. A driver who carelessly runs over a pedestrian is deemed in need of deterrence lest he repeat his act, even though the only significant proof that he is likely to be careless in the future is the fact that he was careless in the past. The same is true of a careless corporation. That a company would elect to its Board of Directors a member who simultaneously directs a competitor in a market in which the two companies share over $300 million of sales, and that it could retain the director for seven years without detecting, or in any event moving to terminate the interlock, implies to us a degree of disregard for the law's requirements that demands remedy, at least so long as the corporation remains in business and continues to hire directors. If there are genuinely extenuating

[1] We note that the Court of Appeals specifically rejected SCM's assertion that the record is insufficient as a matter of law to support the issuance of an order, 565 F.2d at 813.

circumstances, the corporation is peculiarly well suited to suggest what they are.[2] Absent such rebuttal, the inference of cognizable danger of recurrent violation must stand.

For its part, SCM has failed to cite any evidence that might tend to overcome the showing made by complaint counsel. Indeed, what SCM has presented adds to our concern that it may again violate the law in the future. In particular, SCM has promised only to refrain from returning Mr. Bond to its board so long as he directs Kraftco or any other competitor of SCM. SCM has not promised to refrain from other interlocks with either Kraftco or any other competitor of SCM, nor has it indicated that it now has or has ever had *any* procedures whatsoever (let alone adequate procedures) for ensuring that it does not violate Section 8 in its choice of directors.[3]

We are also unpersuaded by SCM's suggestion that the allegedly peculiar nature of Section 8 violations (which harm the public only insofar as they create the potential for anticompetitive abuse), the alleged impossibility of hiding such violations, and their alleged infrequency militate against imposition of an order. It cannot be subject to serious dispute, we believe, that the efforts of federal antitrust agencies to ensure adherence to the antitrust laws depend heavily for their success upon corresponding efforts by the private sector to avoid such violations. It is much more costly for the Federal Trade Commission to determine whether any of SCM's directors simultaneously directs a competitor of SCM than it would be for SCM (which presumably knows who its competitors are) to make the same determination. Unless it is able to create strong monetary incentives for companies which have demonstrated disregard for the law's requirements to maintain such regard in the future, this agency and any other law enforcement agency is relegated to the role of publicly-subsidized house counsel, capable only of spotting violations (to the extent the resources to do so exist) but unable to do more than exhort the violator to mend its ways. We find no precedent to suggest that violations of Section 8 are to be regarded less seriously than any other, or that this agency's ability to enter an order to prevent their recurrence should be subjected to a different standard from that applicable to any other violation of law.

Our conclusions are, we believe, consistent with the mandate of the Court of Appeals, as well as with the teaching of numerous prior

[2] An example of such extenuating circumstances in an interlock case might be that the corporation in fact maintained rigorous procedures for avoiding interlocks, but such procedures proved inadequate to detect the interlock as the result of circumstances beyond the corporation's reasonable control.

[3] We do not mean to suggest that promises made after a Commission investigation has begun are sufficient to obviate the need for an order, *SCM Corp.* v. *FTC supra*, 565 F.2d at 812, but in this case the limited nature of the promise that was made is further grounds for concern.

decisions which hold that the Commission is empowered to enter an order to cease and desist in circumstances in which the violator has discontinued the illegal conduct and volunteered not to repeat it. *E.g., Fedders Corp.* v. *FTC,* 529 F. 2d 1398, 1403 (2d Cir.), *cert. denied,* 429 U.S. 818 (1976); *William H. Rorer, Inc.* v. *FTC,* 374 F.2d 622, 625–26 (2d Cir. 1967); *Coro, Inc.* v. *FTC,* 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965); *Hershey Chocolate Corp.* v. *FTC,* 121 F.2d 968, 971 (3d Cir. 1941); *Perma-Maid Co.* v. *FTC,* 121 F.2d 282, 284–85 (6th Cir. 1941); *Sears, Roebuck & Co.* v. *FTC,* 258 F. 307, 310 (7th Cir. 1919); *FTC* v. *Wallace,* 25 F.2d 733, 738 (8th Cir. 1935).

The order we have entered is identical to the one previously issued. The terms of that order were reviewed by the Commission in the original proceeding, and upon appeal the Court of Appeals expressed no objection, assuming that any order should be deemed appropriate.

IN THE MATTER OF

MARATHON OIL COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2931. Complaint, Oct. 18, 1978 — Decision, Oct. 18, 1978

This consent order, among other things, requires a Findlay, Ohio producer and retailer of petroleum products to cease instituting, or authorizing the institution of debt collection suits in forums other than those in which consumer resided or signed the credit contract. The firm is further required to terminate suits pending in distant counties; vacate resulting default judgments; and provide consumers and credit reporting agencies with notice of such suit terminations.

Appearances

For the Commission: *Eddie W. Correia.*
For the respondent: *William J. Lowrey,* Findlay, Ohio.

COMPLAINT

The Federal Trade Commission, having reason to believe that certain acts and practices engaged in by respondent Marathon Oil Company violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Marathon Oil Company is an Ohio corporation with its principal office located at 539 South Main St., Findlay, Ohio.

PAR. 2. Respondent produces petroleum products and distributes them to consumers for retail purchase.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now causes the sale, ships and distributes its merchandise to purchasers located in various States of the United States. Therefore, respondent maintains a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, respondent extended credit to holders of its credit card for the purpose of facilitating consumers' purchases of respondents's merchandise.

PAR. 5. In the course and conduct of attempting to collect allegedly delinquent retail credit accounts, respondent instituted collection suits in the name of respondent against consumers in counties other than where the consumers resided or signed the contract sued upon.

PAR. 6. The above acts and practices were all to the prejudice and

injury of the public and constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Marathon Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 539 South Main St., in the City of Findlay, State of Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondent, and the proceeding is in the public interest.

Order

I

For purposes of this order, the following term shall apply:

"Suits in a distant forum" shall mean retail credit collection suits, other than suits to enforce an interest in real property securing the consumer's obligation, instituted in a judicial district or similar legal entity other than the one in which the consumer signed the contract sued upon or resides at the commencement of the action.

II

It is ordered, That proposed respondent, Marathon Oil Company, a corporation, and its successors, assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of retail credit accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from instituting, or authorizing the institution of, suits in a distant forum.

III

It is further ordered, That as to any suit in a distant forum instituted by or on behalf of proposed respondent pending on the day this order is served or instituted subsequent to the day on which this order becomes final, such suit shall be terminated and any default judgment entered thereunder vacated forthwith. For such suits instituted prior to the date on which this order is served, "pending" shall mean any suits not reduced to judgment. In all such cases, clear notice shall be provided to the defendants to these actions, to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. 603) which proposed respondent knows or has reason to know recorded the suit or judgment in its files, and to any other person or organization upon request of the defendant.

IV

It is further ordered, That proposed respondent shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions dealing with consumer credit and to each agency with whom proposed respondent currently places its retail credit accounts for collection, and to any other agency prior to referral of proposed respondent's retail credit accounts for collection. Proposed respondent shall obtain and preserve for two (2) years after it terminates its business relationship with any agency with regard to the collection of retail credit accounts, a signed and dated statement from each

agency acknowledging receipt of the order and willingness to comply with it.

V

It is further ordered, That proposed respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporation, including the creation or dissolution of subsidiaries, which may affect compliance obligations arising out of the order.

It is further ordered, That proposed respondent shall, within sixty (60) days and at the end of six (6) months after service upon it of this order served upon it, file with the Commission a report, in writing, signed by proposed respondent setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

NATIONAL INDEMNITY COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-2932. Complaint, Oct. 18, 1978 — Decision, Oct. 18, 1978

This consent order, among other things, requires an Omaha, Nebraska insurance company and its subsidiaries to cease failing to provide insurance applicants with required disclosures regarding preparation of investigative consumer reports and the nature and scope of such investigations.

Appearances

For the Commission: *Rena Steinzor.*
For the respondents: *William D. Lyons,* Omaha, Neb.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that National Indemnity Company, a corporation, and its subsidiaries: Cornhusker Casualty Company, Home and Automobile Insurance Company, Lakeland Fire and Casualty Company, Texas United Insurance Company, Insurance Company of Iowa and Kansas Fire and Casualty Company, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Indemnity Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska, with its principal office and place of business located at 3024 Harney St., Omaha, Nebraska.

Respondent Cornhusker Casualty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska, with its principal office and place of business located at 105 North 31st Ave., Omaha, Nebraska.

Respondent Home and Automobile Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 101 South Wacker Drive, Chicago, Illinois.

Respondent Lakeland Fire and Casualty Company is a corporation organized, existing and doing business under the laws of the State of Minnesota, with its principal office and place of business located at 6700 France Ave. South, Minneapolis, Minnesota.

Respondent Texas United Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 4415 Piedras Drive West, San Antonio, Texas.

Respondent Insurance Company of Iowa is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa with its principal office and place of business located at Box 130, Des Moines, Iowa.

Respondent Kansas Fire and Casualty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas with its principal office and place of business located at 400 Kansas Ave., Suite 211, Topeka, Kansas.

Respondent National Indemnity Company has the authority to control the acts and practices of its subsidiaries, as described herein.

PAR. 2. Respondent National Indemnity Company is now and for some time in the past has been engaged in the underwriting and sale to the public of property and liability insurance in forty-five of the fifty states. Each of the other respondents is now and for some time in the past has been engaged in the underwriting and sale to the public of property and liability insurance primarily in the state in which it is incorporated.

PAR. 3. In the ordinary course and conduct of their business, as aforesaid, respondents regularly procure or cause to be prepared "investigative consumer reports" from "consumer reporting agencies" as these terms are defined in Section 603(e) and 603(f), respectively, of the Fair Credit Reporting Act, 15 USC 1681a(e) and (f) (1970).

PAR. 4. When respondent National Indemnity Company first issues an insurance policy to an individual, Form NI-1583 labeled "Important Notice" is either attached to the face of the policy or mailed under separate cover immediately upon binding of coverage. This notice is typical and illustrative of the notices used under the same circumstances by the other respondents named herein. No report is actually ordered until the time of issue of the policy. Form NI-1583 reads:

IMPORTANT NOTICE

Dear Policyholder:

Thank you for considering the National Indemnity Company as your insurance

carrier. As part of our underwriting procedure, a routine inquiry may be made to obtain applicable information concerning character, general reputation, personal characteristics, and mode of living. Upon written request, additional information as to the nature and scope of the report, if one is made, will be provided.

This notice is provided in all cases unless the type of policy involved definitely will not require an investigative consumer report.

Respondents send no other notice informing the applicant that an investigative report may be prepared and stating his right to inquire further into the nature and scope of such a report, although wording identical to that of Form NI-1583 is contained in the application itself.

PAR. 5. By and through the use of the practices described in Paragraph Four, above, respondents have failed to inform consumers that: (1) an "investigative consumer report" may be prepared in connection with their applications for insurance; (2) the information contained in the report may be obtained through personal interviews with neighbors, friends or others with whom the consumer is acquainted; and (3) upon written request, a complete and accurate disclosure of the nature and scope of the investigative report will be provided. Therefore, respondent has violated the provisions of Section 606(a) of the Fair Credit Reporting Act.

PAR. 6. Once the applicant has received the Notice contained in Form NI-1583 and has written to respondent indicating a desire to receive "additional information as to the nature and scope of the report," respondent National Indemnity Company issues a follow-up form, numbered NI-1584. This notice is typical and illustrative of the notices used under the same circumstances by the other respondents named herein. This form reads:

This is in response to your request for additional information about an inquiry or report which may have been made in connection with your application for insurance.
- No report was requested in connection with your application.
- A report was requested. These reports are routine procedures which include such general identification information as residence verification, marital status, and number of children. As applicable, employment, occupation, general helath (sic), habits, reputation and mode of living information may be included.

When insurance coverage for automobile(s), other personal property or real property is involved, applicable information may include a physical description of the property, its condition and uses, and any losses incurred. For automobile insurance, additional information concerning drivers and any physical impairments, losses or violations they may have suffered is also applicable.

NATIONAL INDEMNITY COMPANY

The above disclosure is provided in response to all consumer

requests for disclosure of the nature and scope of the investigation completed.

Respondents typically send no other letter to consumers who request additional information concerning investigative consumer reports which were procured or prepared about them.

PAR. 7. By and through the use of the practices described in Paragraph Six above, respondents have failed to inform the consumer of the name and address of the consumer reporting agency which prepared the investigatory report; the type of questions asked; and the number and type of persons interviewed. Therefore, respondents have violated the provisions of Section 606(b) of the Fair Credit Reporting Act.

PAR. 8. By its aforesaid failure to comply with Sections 606(a) and 606(b) of the Fair Credit Reporting Act, and pursuant to Section 621(a) thereof, respondent has thereby engaged in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Fair Credit Reporting Act and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedures prescribed in Section 2.34(b) of its

Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent National Indemnity Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska, with its office and principal place of business located at 3024 Harney St., Omaha, Nebraska.

Respondent Cornhusker Casualty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska, with its principal office and place of business located at 105 North 31st Ave., Omaha, Nebraska.

Respondent Home and Automobile Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 101 South Wacker Drive, Chicago, Illinois.

Respondent Lakeland Fire and Casualty Company is a corporation organized, existing and doing business under the laws of the State of Minnesota, with its principal office and place of business located at 6700 France Ave. South, Minneapolis, Minnesota.

Respondent Texas United Insurance Company is a corporation organized, existing and doing business under and by viture of the laws of the State of Texas, with its principal office and place of business located at 4415 Piedras Drive West, San Antonio, Texas.

Respondent Insurance Company of Iowa is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa with its principal office and place of business located at Box 130, Des Moines, Iowa.

Respondent Kansas Fire and Casualty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas with its principal office and place of business located at 400 Kansas Ave., Suite 211, Topeka, Kansas.

Respondent National Indemnity Company has the authority to control the acts and practices of its subsidiaries, as described herein.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, National Indemnity Company, a corporation, and its subsidiaries: Cornhusker Casualty Company, Home and Automobile Insurance Company, Lakeland Fire and Casualty Company, Texas United Insurance Company, Insurance Company of Iowa and Kansas Fire and Casualty Company, their

successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with either the request for or the receipt or consideration of any "investigative consumer report," as that term is defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(e) (1970)), do forthwith cease and desist from:

(1) Failing, whenever respondents procure or cause to be prepared an investigative consumer report, to clearly and accurately disclose to the consumer that:

(A) an "investigative consumer report" may be made in connection with the application, including information regarding the consumer's character, general reputation, personal characteristics or mode of living;

(B) the information contained in the report will be obtained through personal interviews with neighbors, friends, or associates of the consumer or with others with whom the consumer is acquainted or who may have knowledge concerning any such items of information; and,

(C) the consumer has the right to request, within a reasonable period of time, a complete and accurate disclosure of the nature and scope of the investigative report, and that upon such request respondents shall make such disclosure in writing mailed or otherwise delivered to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or the investigative report was first requested, whichever is later.

(2) Failing, whenever an applicant requests additional information concerning an investigative consumer report to furnish the consumer with a complete and accurate disclosure of the nature and scope of the investigation requested including:

(A) the name and address of the consumer reporting agency which prepared the investigative report; and,

(B) a detailed written summary of the areas investigated and the types of questions asked which includes a description of all the information covered by the interview forms typically used to prepare the investigative consumer report. In lieu of a written summary, respondents may satisfy the requirements of this subsection by providing the consumer with a blank copy of any standardized form used to transmit information from the consumer reporting agency to the user, to the extent to which these forms itemize with specificity the questions to be asked and the areas to be investigated; and,

(C) if the investigative consumer report has been completed at the time the consumer makes his request, the number and type of

persons interviewed, if known, or, if not known, the usual number and type of persons interviewed. If the report has not been completed at the time of the request, the minimum number and type of persons normally interviewed in connection with such a report.

It is further ordered, That respondents shall preserve evidence of compliance with the requirements imposed under this order for a period of not less than 2 years after the date each required disclosure is made. Respondents shall upon request permit the Commission through its daily authorized representatives to inspect such records.

It is further ordered, That respondents shall deliver a copy of this order to cease and desist to all present and future employees engaged in reviewing or evaluating consumer reports or other third party information in connection with applications for insurance to be used for personal, family or household purposes.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

COVENTRY BUILDERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TRUTH IN LENDING AND FEDERAL TRADE COMMISSION ACTS

Docket 9042. Complaint[1] *July 15, 1975 — Decision, Oct. 23, 1978*

This consent order, among other things, requires a Shaker Heights, Ohio home improvements firm to cease, in connection with the extension of credit, failing to provide consumers with those materials and disclosures required by Federal Reserve System regulations.

Appearances

For the Commission: *Aaron H. Bulloff, Allan M. Huss* and *Sharon J. Devine.*

For the respondents: *Leonard P. Gilbert,* Cleveland, Ohio, *Stanley M. Fischer* and *David A. Schaefer, Guren, Merritt, Sogg & Cohen,* Cleveland, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Coventry Builders, Inc., a corporation, and Louis Galiano, Sr., individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and of the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Coventry Builders, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1824 Coventry Road, Cleveland Heights, Ohio.

Respondent Louis Galiano, Sr. is an individual and is the president of respondent corporation. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts

[1] Reported as amended by the ALJ's order of March 5, 1976.

and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale, delivery, and installation of residential home improvements including, but not limited to, siding materials, storm windows, plumbing fixtures, and cabinetry, to the public at retail.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents have arranged, and continue to arrange, for the extension of consumer credit, or offer to extend or arrange for the extension of such consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business and in connection with their credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, have been, and continue to be, engaged in the extension of credit, as the term "credit" is defined in Section 226.2(l) of Regulation Z.

Respondents many times have caused, and are now causing, their customers to execute a document entitled "Offer of Purchase," hereinafter sometimes referred to as "the sales contract," and one or more promissory notes for the purchase and installation of home improvements to the residence of the customer.

Respondents provide certain consumer credit cost information as part of this sales contract. Respondents provide no other consumer credit cost disclosures to their customers.

PAR. 5. Respondents many times, in the ordinary course of their business, negotiate to third parties the sales contracts or other instruments of indebtedness executed in connection with credit purchases.

PAR. 6. By and through the use of the sales contract, respondents:

(1) Have in certain instances failed to disclose the annual percentage rate, as required by Section 226.8(b)(2) of Regulation Z, computed with an accuracy at least to the nearest one quarter of one percent, as prescribed by Section 226.5(b) of Regulation Z.

(2) Have in certain instances failed to preserve evidence of compliance with the requirements of Regulation Z for a period of not less than two years after the date each disclosure was required to be made, as required by Section 226.6(i) of Regulation Z.

(3) Have in certain instances failed to make the disclosures

prescribed by Section 226.8 of Regulation Z before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

(4) Have in certain instances failed to furnish customers with a duplicate of the instrument or a statement by which the disclosures prescribed by Section 226.8 of Regulation Z are made, and on which the creditor is identified, as required by Section 226.8(a) of Regulation Z.

(5) Have in certain instances failed to disclose the amount or method of computing the amount of any default, delinquency, or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

(6) Have in certain instances failed to provide a description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

(7) Have in certain instances failed to give clear identification of the property to which the security interest relates, as required by Section 226.8(b)(5) of Regulation Z.

(8) Have failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

(9) Have failed to disclose the sum of the unpaid balance of cash price and all other charges included in the amount financed but which are not part of the finance charge, and to describe that sum using the term "unpaid balance," as required by Section 226.8(c)(5) of Regulation Z.

PAR. 7. By and through the use and acceptance of the sales contract, and by virtue of the work performed on a customer's residence, respondents have retained or acquired, or will retain or acquire, a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, in real property which is used or is expected to be used as the principal residence of the customer. Respondents' retention or acquisition of such security interest in said real property gives their customers who are extended consumer credit, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of all disclosures required by Regulation Z, whichever is later, pursuant to Section 226.9(a) of Regulation Z.

PAR. 8. In connection with the aforesaid consumer credit transactions, as set forth in Paragraph Seven, respondents, in certain instances:

(1) Have failed to give notice to the customer of his right to rescind the credit transaction by furnishing him with the "notice to customers required by federal law," described in Section 226.9(b) of Regulation Z, as required by Section 226.9(b) of Regulation Z.

(2) Have failed to delay performance of any of the following actions until after the rescission period has expired, and they have reasonably satisfied themselves that the customer has not exercised his right of rescission, as required by Section 229.9(c) of Regulation Z:

a. The disbursement of monies other than in escrow;

b. The making of any physical changes in the property of the customer;

c. The performance of any work or service for the customer; or

d. The making of any deliveries to the residence of the customer if the creditor has retained or will retain or will acquire a security interest other than one arising by operation of law.

PAR. 9. Respondents have stated, utilized, or placed information or explanations not required by Regulation Z in the various versions of their sales contracts, in a manner which misleads or confuses the customer or contradicts, obscures, or detracts attention from the information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

PAR. 10. By the aforesaid actions, respondents have failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, 15 U.S.C. 1601, *et seq.*, respondents' aforesaid failures to comply with Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*).

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the Truth in Lending Act, and the implementing regulation promulgated thereunder, and the respondents having been served with a copy of that complaint, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint as issued herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25 of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Coventry Builders, Inc. is a corporation formerly organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business formerly located at 13015 Larchmere, in the City of Shaker Heights, State of Ohio.

Respondent Louis Galiano, Sr. was an officer of said corporation. He formulated, directed, and controlled the policies, acts, and practices of said corporation. His address is 231 - 174th St., North Miami Beach, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Coventry Builders, Inc., a corporation, its successors and assigns, and its officers, and Louis Galiano, Sr., individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the extension of consumer credit or advertisements to aid, promote, or assist, directly or indirectly, in the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (15 U.S.C. 1601, *et seq.),* do forthwith cease and desist from:

(1) Failing to disclose the "annual percentage rate," computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(2) Failing to retain evidence of compliance with the requirements of Regulation Z for a period of not less than two (2) years after the date each disclosure was required to be made, as required by Section

226.6(i) of Regulation Z. Evidence of compliance shall include, but not be limited to, copies of all disclosure statements and rescission statements required by Regulation Z, which pertain to contracts ultimately rescinded, modified, renegotiated, or otherwise not accepted either by respondents or by the consumer.

(3) Failing to furnish customers with the disclosures prescribed by Section 226.8 of Regulation Z before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

(4) Failing to furnish customers with a duplicate of the instrument or a statement by which the disclosures prescribed by Section 226.8 of Regulation Z are made, and on which the creditor is identified, as required by Section 226.8(a) of Regulation Z.

(5) Failing to disclose the amount or method of computing the amount of any default, delinquency, or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

(6) Failing to disclose a description or identification of the type of security interest held or to be retained or acquired by the creditor in connection with the extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

(7) Failing to clearly identify the property to which the security interest relates, as required by Section 226.8(b)(5) of Regulation Z.

(8) Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

(9) Failing to disclose the sum of the unpaid balance of cash price and all other charges included in the amount financed but which are not part of the finance charge, and to describe that sum using the term "unpaid balance," as required by Section 226.8(c)(5) of Regulation Z.

(10) Supplying any information, explanation, or contract clause not required to be disclosed by Regulation Z in a manner which misleads or confuses the customer or contradicts, obscures, or detracts attention from the information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

(11) Failing to provide consumers having the right to rescind a transaction pursuant to Section 226.9 of Regulation Z with two copies of the "Notice to the Consumer Required by Federal Law," in the manner and form required by Section 226.9(b) of Regulation Z.

(12) Failing to delay performance until after the period of time allowed for rescission by the consumer has expired and respondents herein have reasonably satisfied themselves that the customer has not exercised his right of rescission, as required by Section 226.9(c) of

Regulation Z. In this regard, respondents shall not perform, or cause or permit to be performed, during the rescission period, any of the following actions:

(a) The disbursement of monies other than in escrow;

(b) The making of any physical changes in the property of the customer;

(c) The performance of any work or service for the customer; or

(d) The making of any deliveries to the residence of the customer if the creditor has retained or will retain or will acquire a security interest other than one arising by operation of law.

(13) Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Section 226.4 and Section 226.5 of Regulation Z at the time and in the manner, form, and amount required by Sections 226.6, 226.7, 226.8, 226.9, and 226.10 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to all present and future sales and office personnel whose services are engaged by respondents, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, voluntary bankruptcy, assignment, the creation or dissolution of subsidiaries, which may affect compliance obligations arising out of this order, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That respondents shall, within sixty (60) days after the effective date of this order, file with the Commission a report setting forth the manner in which they have complied with the provisions of this order, and any future compliance reports in the form and manner which the Commission may order.

IN THE MATTER OF

MOORE & ASSOCIATES, INC., ET AL., TRADING AS UNI-CHECK, ETC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-2933. Complaint, Oct. 24, 1978 — Decision, Oct. 24, 1978

This consent order, among other things, requires a Honolulu, Hawaii firm engaged in providing various businesses with consumer credit information and other services, to cease furnishing reports containing obsolete, inaccurate, or disputed information; providing such reports for improper purposes; or otherwise failing to comply with statutory requirements.

Appearances

For the Commission: *Harold G. Sodergren.*
For the respondent: *Peter G. Wheelon,* Honolulu, Hawaii.

COMPLAINT

I

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Fair Credit Reporting Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Moore & Associates, Inc., a corporation, doing business as Uni-Check, and Rentcheck, and R. Donald Moore, individually and as an officer of said corporation, hereinafter referred to as "respondents," have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Moore & Associates, Inc. is a Hawaii corporation, with its principal office at 677 Ala Moana Boulevard, Suite 211, Honolulu, Hawaii.

Respondent R. Donald Moore is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

II

PAR. 2. A. Respondents, in the ordinary course and conduct of their

business under the tradename "Uni-Check," guarantee personal checks presented by consumers to merchants and banks. A subscriber to the service telephones respondents' computerized record system, provides a consumer's identifying number (*e.g.*, driver's license number, credit card number), and receives a coded response indicating, among other things, whether respondents will guarantee the consumer's check which has been tendered to the subscriber.

B. Respondents, in the ordinary course and conduct of their business under the tradename "Rentcheck," guarantee landlords against financial loss resulting from non-payment of rent, malicious damage, or breach of lease. A subscriber to the service, prior to occupancy of the dwelling by a prospective tenant, follows the procedure described above in conjunction with the Uni-Check service, and receives a coded response indicating, among other things, whether respondents will guarantee the landlord against financial loss caused by the prospective tenant.

C. Respondents, in the ordinary course and conduct of their business, in conjunction with their Rentcheck service, provide landlords not desiring a guarantee against financial loss pursuant to a "Non-Guarantee Plan," with adverse information relating to a prospective tenant, where respondents have adverse information on file. The landlord follows the procedure described above in conjunction with the Uni-Check service, and receives a coded response. If the response indicates adverse information is on file, the landlord obtains detailed information regarding the prospective tenant from respondents in a subsequent communication.

D. Respondents, in the ordinary course and conduct of their business, provide banks with information regarding consumers making application for checking accounts. The bank follows the procedure described above in conjunction with the Uni-Check service, and receives a coded response. If the response indicates adverse information is on file, the bank obtains detailed information regarding the applicant from respondents in a subsequent communication.

PAR. 3. The data regarding consumers which is utilized by respondents in supplying the above information to subscribers is contained in a single computer data base, and consists of information relating to dishonored checks, cancellation of credit cards, termination of checking accounts, non-payment of rent, damage to property, breach of lease, and other information.

A. The communication by respondents to a subscriber, in connection with the Uni-Check service described in Paragraph 2A, that respondents will not guarantee a consumer's check, is the

communication of information which bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and/or mode of living. Therefore, said communication is a consumer report, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act.

B. The communication by respondents to a subscriber, in connection with the Rentcheck service described in Paragraph 2B, that respondents will not guarantee that a prospective tenant will not cause the landlord financial loss, is the communication of information which bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and/or mode of living. Therefore, said communication is a consumer report, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act.

C. The communication by respondents to a subscriber, in connection with the Rentcheck "Non-Guarantee Plan" described in Paragraph 2C, that respondents possess adverse information regarding a prospective tenant, or the communication of such adverse information, is the communication of information which bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and/or mode of living. Therefore, said communication is a consumer report, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act.

D. The communication by respondents to a subscriber in connection with persons making application for the bank checking account service described in Paragraph 2D, that respondents possess adverse information regarding a prospective account holder, or the communication of such adverse information, is the communication of information which bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and/or mode of living. Therefore, said communication is a consumer report, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act.

PAR. 4. Respondents are, and have been, for monetary fees, regularly engaged in the practice of assembling information on consumers for the purpose of communicating such information to third parties, as described in Paragraphs Two and Three above, and regularly use, and for some time last past have regularly used, a means of facility of interstate commerce for the purpose of preparing and/or furnishing such communications. Therefore, respondents are a consumer reporting agency as "consumer reporting agency" is defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 5. In the course and conduct of their business of communicating information to third parties, as described in Paragraphs Two, Three, and Four, above, respondents have:

A. Failed to maintain reasonable procedures designed to prevent, in accordance with Section 605 of the Fair Credit Reporting Act, the inclusion in consumer reports of certain items of obsolete information, as required by Section 607(a) of the Fair Credit Reporting Act.

B. Failed, as to subscribers to respondents' services, to establish procedures requiring said subscribers to certify the purposes for which the information on consumers is sought, and to certify that the information will be used for no other purpose. Therefore, respondents failed to maintain reasonable procedures designed to limit the furnishing of consumer reports to the purposes specified under Section 604 of the Fair Credit Reporting Act, as required by Section 607(a) of the Fair Credit Reporting Act.

C. Failed, when the completeness or accuracy of any item of information contained in the consumer's file is disputed by the consumer, to clearly note in any subsequent consumer report containing the information in question, that it is disputed by the consumer, and to provide either the consumer's statement or a clear and accurate codification or summary thereof, as required by Section 611(c) of the Fair Credit Reporting Act.

Therefore, respondents have violated, and are violating, Sections 607(a) and 611(c) of the Fair Credit Reporting Act.

III

PAR. 6. Respondents, in the ordinary course and conduct of their business, provide by telephone to subscribing hotels in the State of Hawaii, the uncoded identity of a person who has been reported by another subscribing hotel to have failed to pay a hotel charge. Such communication is made by respondents to a subscribing hotel prior to the subscribing hotel's need for such information, premised upon a request by such person for services at the subscribing hotel to which such person's identity is communicated.

PAR. 7. The communication of the identity of persons who have failed to pay a hotel charge to other hotels in the aforesaid manner is the communication of information which bears on said person's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and/or mode of living. Therefore, said communication is a consumer report, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act.

PAR. 8. Respondents are, and have been, for monetary fees,

regularly engaged in the practice of assembling such information on consumers for the purpose of communicating such information to third parties, as described in Paragraphs Six and Seven above, and regularly use a means or facility of interstate commerce for the purpose of preparing and/or furnishing such information. Therefore, respondents are a consumer reporting agency as "consumer reporting agency" is defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 9. At the time respondents furnish each of the consumer reports described in Paragraphs Six, Seven, and Eight, above, respondents do not have reason to believe that each person to whom the consumer report is furnished has a legitimate business need for the information in such report in connection with a business transaction involving the consumer reported upon, nor do respondents have reason to believe that each recipient otherwise intends to use the information contained in such report for a purpose set forth in Section 604 of the Fair Credit Reporting Act. Further, the furnishing of such consumer report is neither in response to a court order nor in accordance with the written instructions of the consumer to whom the report relates.

Therefore, respondents, in the ordinary course and conduct of their business, as aforesaid, furnish consumer reports to persons, as "person" is defined in Section 603(b) of the Fair Credit Reporting Act, who do not have a legitimate business need or other permissible purpose to receive the consumer reports furnished to them, as required by Section 604(3) of the Act.

Therefore, by furnishing consumer reports in the manner described above, respondents have violated, and are violating, Section 604 of the Fair Credit Reporting Act.

PAR. 10. By and through the acts and practices described in Paragraphs Six, Seven, Eight, and Nine, above, respondents have failed to maintain reasonable procedures to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Fair Credit Reporting Act, and have furnished consumer reports to persons under circumstances in which there are reasonable grounds for believing that such reports will not be used for a purpose listed in Section 604 of such Act.

Therefore, respondents have violated and are violating, Section 607(a) of the Fair Credit Reporting Act.

IV

PAR. 11. The acts and practices set forth in Paragraphs Two through Ten, above, were and are in violation of the Fair Credit

Reporting Act, and, pursuant to Section 621(a) of that Act, said acts and practices constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Fair Credit Reporting Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Moore & Associates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Hawaii, with its office and principal place of business located at 677 Ala Moana Boulevard, Suite 211, Honolulu, Hawaii.

Respondent R. Donald Moore is an officer of said corporation. He formulates, directs, and controls the policies, acts and practices of said corporation, and his personal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Moore & Associates, Inc., a corporation, d/b/a Uni-Check, Rentcheck, or under any other name, its successors and assigns, and its officers, and R. Donald Moore, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with collecting, preparing, assembling and/or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act (Pub. Law 91-508, 15 U.S.C. 1601, *et seq.*), shall forthwith cease and desist from:

1. Failing to maintain reasonable procedures designed to prevent, in accordance with Section 605 of the Fair Credit Reporting Act, the inclusion in consumer reports of obsolete information, as required by Section 607(a) of the Fair Credit Reporting Act.

2. Furnishing any consumer report to any person, unless such report is furnished:

a. In response to the order of a court having jurisdiction to issue such order; or

b. In accordance with the written instructions of the consumer to whom the report relates; or

c. To a person whom respondents then have reason to believe intends, at the time the information is furnished, to use the information:

(1) In connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(2) For employment purposes; or

(3) In connection with the underwriting of insurance involving the consumer; or

(4) In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(5) In connection with a business transaction involving the consumer.

Provided, however, a consumer report may be furnished prior to a time when respondents have reason to believe a person intends to use the information for a purpose enumerated in subsection c, above, if the identity of the consumer(s) to whom the information relates is not disclosed on such consumer report and cannot be determined

without the use of a unique identifier, such as a social security number, driver's license number, or bank account number. The identifier used must be provided by the consumer at the time of the transaction with the user. Communication of information pursuant to this proviso does not relieve respondents of responsibility to comply with all order requirements of the order in connection with such transaction.

3. Failing to maintain reasonable procedures necessary to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Act, as provided by Section 607 of the Act.

4. Failing to require prospective users of consumer reports to certify the purposes for which the information in such reports is sought, and that it will be used for no other purpose, in accordance with Section 607(a) of the Fair Credit Reporting Act.

5. Furnishing consumer reports to any user or prospective user of such reports who does not first provide the identification and the certification of purpose for which information in such reports is sought, as required by Section 607(a) of the Fair Credit Reporting Act.

6. Failing, when the completeness or accuracy of any item of information contained in the consumer's file is disputed by the consumer, to clearly note, in any subsequent report containing the information in question, that it is disputed by the consumer, and to provide either the consumer's statement or a clear and accurate codification or summary thereof, as required by Section 611(c) of the Fair Credit Reporting Act.

7. Failing to comply with all requirements relating to consumer reporting agencies contained in Sections 604, 605, 607, 609, 610, 611, 612, 613, and 614 of the Fair Credit Reporting Act.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the preparation and/or furnishing of consumer reports, and that respondents secure a signed statement acknowledging receipt of said order from all such personnel.

It is further ordered, That the corporate respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new

business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities involve consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act (Pub. Law 91-508, 15 U.S.C. 1601, *et seq.),* or of his affiliation with a new business or employment in which his own duties and responsibilities involve consumer reports. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BEDE AIRCRAFT, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2934. Complaint, Oct. 26, 1978 — Decision, Oct. 26, 1978

This consent order, among other things, requires a Washington, D.C. manufacturer and marketer of aircraft and related products, and its subsidiaries, to provide and administer as prescribed an approximately $9,000,000 redress fund for consumers who purchased or made deposits on its products. The firm is required to cease misrepresenting the availability, performance, reliability, and safety of its aircraft; or using any other unfair or deceptive act or practice in the advertising and sale of its products. Additionally, until such time that existing obligations are satisfied, the order requires that all of the firm's stock be placed in the hands of an approved trustee who would oversee its operations, and invoke the provisions of the federal Bankruptcy Act if necessary.

Appearances

For the Commission: *Kenneth R. Bennington.*

For the respondents: *Dale Curtis Hogue* and *William R. Bernard, Hogue, Crothers & Bernard,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Bede Aircraft, Inc., a corporation, Bede General Corporation, a corporation; Bede Wing, Inc., a corporation; James R. Bede, individually and as an officer, director and stockholder of said corporations; hereinafter referred to as respondents, have violated provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in the enumerated paragraphs below.

Allegations of respondents' present acts and practices include respondents' past acts and practices. Allegations in the present tense include the past tense. Allegations of respondents' representations or statements include those made directly or by implication, those made in sales contracts, advertising, promotional materials and sales communications, and representations made orally, visually, or in writing.

For purposes of the allegations enumerated herein, the following definitions apply:

The phrase "advance payment or deposit" means a payment or deposit tendered to respondents in connection with the order or sale of any product, under circumstances in which shipment to the buyer will not take place on the same day on which such payment or deposit is tendered;

"BD–5 homebuilt aircraft" means any aircraft materially within the design parameters of the single-seat, single-engine aircraft commonly referred to by respondents as the "BD–5," which is advertised for sale or sold for full or partial assembly from a kit or from parts, materials or plans supplied wholly or partially by respondents;

"BD–5D aircraft" means any aircraft materially within the general design parameters of the single-seat, single-engine aircraft commonly referred to by respondents as the "BD–5," which is advertised for sale or sold as a production aircraft (as the word "production" is defined herein);

"BD–7 aircraft" means any aircraft materially within the general design parameters of the two to four place, low-wing aircraft commonly referred to by respondents as the "BD–7;"

"FAA" means the Federal Aviation Administration, an agency of the United States Government;

"production" means, in describing any product, that such product is commercially manufactured or fabricated in significant numbers for ultimate distribution or sale in the usual course of business, as opposed to being manufactured or fabricated in small numbers as a model or prototype, or for limited distribution or use not in the usual course of trade;

"proper refund request" means a written notification reasonably calculated to put the refundor on notice that the refundee wishes to exercise a present or future right to a refund. In the latter instance, the refund request becomes "proper" when the right to refund actually vests;

"ship, shipping or shipment" refer to the act by which merchandise is physically placed by respondents in possession of the carrier, or if there is no carrier, in possession of the buyer or his agent; or in the case of aircraft, transfer of the FAA title certificate;

"specialized tools, machines or processes" means tools or machines which a homebuilder of average ability and resources would not reasonably be expected to own, or in the case of processes, those which such homebuilder would not be reasonably expected to be capable of personally performing.

PARAGRAPH 1. Respondent Bede Aircraft, Inc. is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Kansas, with an office located at 1128 Sixteenth St., N.W., Washington, D. C.

Respondent Bede General Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with an office located at 1128 Sixteenth St., N.W., Washington, D. C.

Respondent Bede Wing, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with an office located at 1128 Sixteenth St., N.W., Washington, D.C.

Respondent James R. Bede is sole stockholder and an officer and director of respondents Bede Aircraft, Inc., and Bede General Corporation. Respondent Bede is a stockholder, officer and director of respondent Bede Wing, Inc.

Respondent James R. Bede formulates, directs and controls the acts and practices of respondents Bede Aircraft, Inc., Bede General Corporation, and Bede Wing, Inc. The business address of respondent Bede is 1128 Sixteenth St., N.W., Washington, D.C.

Respondents have cooperated and acted together to bring about the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time have been, engaged in the business of advertising, offering for sale and selling homebuilt aircraft kits, production aircraft, and aircraft parts plans, materials and accessories. Respondents' aforesaid business is carried on both directly and indirectly, and through the use of licensees or franchisees.

Respondents furnish the means and instrumentalities for a sales program whereby members of the general public, by means of advertisements placed in media of general circulation, promotional brochures and other media, and by means of statements, representations, acts and practices as hereinafter set forth, are induced to sign contracts, make deposits for future deliveries, or otherwise obligate themselves for the purchase of various of respondents' products.

In the manner aforesaid, respondents dominate, control, furnish the means, instrumentalities, services and facilities for, and condone, approve, and accept the pecuniary and other benefits following from the acts and practices hereinafter set forth of respondents' employees, franchisees and licensees. By and through the use of the acts, practices, statements and representations set forth herein, respondents place in the hands of others the means and instrumentalities by and through which such others mislead and deceive the public in the manner and as to the things herein alleged.

PAR. 3. Respondents' volume of business is substantial and their

acts and practices as hereinafter set forth are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business, and all times mentioned herein, respondents have been and now are in substantial competition in or affecting commerce, with corporations, firms and individuals in the sale of aircraft, aircraft kits and aircraft parts, plans, materials and accessories.

COUNT ONE

Alleging certain violations of Section 5 of the Federal Trade Commission Act. The allegations of Paragraphs One through Four hereof are incorporated by reference in Count One as if fully set forth verbatim.

PAR. 5. In the further course and conduct of their business, respondents have prepared financial statements, including balance sheets, income statements and other documents purporting to reflect material aspects of respondents' financial status; respondents have transmitted such financial statements to third parties, representing to such third parties that such statements accurately and truthfully reflect respondents' financial status as of the time to which such statements purport to relate.

Respondents have failed to prepare such financial statements in accordance with generally accepted accounting standards, and have failed to disclose such failure in a clear and conspicuous manner. Respondents have misrepresented the truthfulness and accuracy of such financial statements under circumstances in which respondents knew or should have known that such documents portrayed respondents' financial status and ability to fulfill its consumer obligations in a significantly more positive manner than was in fact the case.

By so failing to prepare financial statements in accord with generally accepted accounting standards, by nondisclosure of such failure and by so misrepresenting the truthfulness and accuracy of such statements, respondents have engaged in unfair and deceptive acts or practices.

PAR. 6. In the further course and conduct of their business, respondents have represented that Bede Aircraft, Inc. is a solvent, ongoing enterprise, capable of fulfilling its obligations and duties, and that the corporation maintains a solid financial basis and every prospect for a continued viable, active business existence.

In truth and in fact, Bede Aircraft, Inc. has, during much of its corporate existence, been insolvent as "insolvent" is defined in the

Bankruptcy Act, 11 USCA 1; Bede Aircraft, Inc., has also from time to time committed acts of bankruptcy, as such acts are defined in the Bankruptcy Act, 11 USCA 21. Respondent Bede Aircraft, Inc. has been in a precarious financial position during much of its corporate existence, unable to pay its debts as they come due, and has engaged in business under circumstances raising reasonable doubts about the corporation's ability to discharge its consumer obligations and duties, and to continue a viable, active business existence.

Respondents have misrepresented material facts with respect to the solvency and business health of Bede Aircraft, Inc.; respondents have also failed to disclose relevant and material facts with respect to the solvency of Bede Aircraft, Inc. in the course and conduct of business with customers, who, had they been aware of such facts, may have substantially altered or abated their dealings with respondents. By so misrepresenting material facts, and by so failing to disclose relevant and material facts, respondents have engaged in unfair and deceptive acts or practices.

PAR. 7. In the further course and conduct of their business under the circumstances set forth in Paragraph Six, respondents have failed to avail themselves of the various remedial procedures of the Bankruptcy Act, including reorganization, rehabilitation, or liquidation. By so failing to avail themselves of such remedial devices, respondents have prejudiced the ability of their customers, to receive the benefits of contracts and agreements with respondents, or in the alternative, to receive restitution of amounts paid or deposited with respondents.

By so failing to avail themselves of the remedial devices of the Bankruptcy Act and by so prejudicing the rights of their customers, respondents have engaged in unfair acts or practices.

PAR. 8. During the course and conduct of their business, respondents represented that Bede General Corporation actually existed as a business entity legally authorized to do business as a corporation. Respondents further represented that Bede General Corporation was an entity separate from respondents' other business operations, with all of the tangible and intangible attributes of an active, viable, corporation.

In truth and in fact, during much of the period concerned in this complaint Bede General Corporation did not legally exist as a corporate entity; respondents failed to comply with the laws of any jurisdiction entitled to authorize corporate existence, and further failed to supply Bede General Corporation with business and financial attributes other than those constituting an illusory corporate existence. Respondents further failed to disclose such facts

to customers who, had they been aware of such facts may have substantially altered or abated their dealings with respondents.

By so failing to supply Bede General Corporation with the legal attributes of incorporation as well as the attributes implied by respondents' representations, and by further failing to disclose material facts with respect to such circumstances, respondents have engaged in unfair and deceptive acts or practices.

COUNT TWO

Alleging violations of Section 5 of the Federal Trade Commission Act, with respect to the BD-5 homebuilt aircraft. The allegations of Paragraphs One through Four hereof are incorporated by reference in Count Two as if fully set forth verbatim.

PAR. 9. In the further course and conduct of their business, respondents have represented that they have actually available for sale, ready to ship, complete kits for the assembly of the BD-5 homebuilt aircraft.

In truth and in fact, respondents do not have available for immediate shipment complete BD-5 homebuilt aircraft kits, nor do such complete kits exist. Significant elements, including key parts, assembly plans and instructions, and engine and drive system subassemblies, have not been fully developed or procured, and are not available to respondents for shipment to buyers of the BD-5 homebuilt aircraft kit. Therefore, the acts and practices described in Paragraph Nine are deceptive.

PAR. 10. In the further course and conduct of their business, respondents have represented that upon remittance of the proper contract amount for the purchase of the BD-5 homebuilt aircraft kit, respondents will begin and complete delivery of various kit installments according to a predetermined schedule calculated to provide the homebuilder with necessary parts, plans and materials in a logical sequence and at reasonable intervals.

In truth and in fact, at all times concerned herein, respondents could not complete delivery of necessary kit elements in a logical sequence or at reasonable intervals, since significant elements have been unavailable to respondents and the date of availability of such elements is not known to respondents with reasonable certainty. Therefore, the acts and practices described in Paragraph Ten are deceptive.

PAR. 11. In the further course and conduct of their business, respondents have represented that BD-5 homebuilt aircraft kits contain production engines and drive systems which are capable of

certain affirmatively stated criteria with respect to performance, reliability and safety.

In truth and in fact, engine and drive system subassemblies have not been developed or produced, beyond the prototype or experimental stage. Accordingly, no production engines or drive systems exist which meet respondents' representations with respect to performance, reliability and safety. Respondents have failed to disclose that representations with respect to performance, reliability and safety are based upon design inferences and expectations, rather than upon data derived from the actual use and testing of production engines and drive systems. Therefore, the acts and practices described in Paragraph Eleven are unfair and deceptive.

PAR. 12. In the further course and conduct of their business, respondents have represented that no more than 800 work hours are required for the homebuilder to fully assemble the BD–5 homebuilt aircraft.

In truth and in fact, homebuilders of average ability have found that substantially more than 800 work hours are necessary to assemble the BD-5 homebuilt aircraft. Respondents lacked a reasonable basis for such representations and have failed to remedy or correct such representations as evidence has accumulated tending to show that respondents' estimates and representations were significantly below the results of actual homebuilder experience. Therefore, the acts and practices described in Paragraph Twelve are unfair and deceptive.

PAR. 13. In the further course and conduct of their business, respondents have represented that the homebuilder will need only simple hand tools for assembly of the BD–5 homebuilt aircraft kit.

In truth and in fact, with respect to certain subassemblies, specialized tools, machines or processes are necessary to complete the aircraft kit according to respondents' specifications and plans. Respondents have failed to disclose that the homebuilder must acquire specialized equipment, or resort to a third party such as a commercial welding or machine shop for completion of certain kit assembly operations. Therefore, the acts and practices described in Paragraph Thirteen are unfair and deceptive.

PAR. 14. In the further course and conduct of their business, respondents have represented that money deposited or paid for some or all subassemblies of the BD–5 homebuilt aircraft would, to the extent that further research and development was necessary to perfect such subassemblies, actually be used directly or indirectly for such purposes.

In truth and in fact, significant amounts of money deposited or

paid by buyers for some or all subassemblies of the BD–5 homebuilt aircraft has been diverted by respondents to research and development with respect to other of respondents' products, as well as other uses, not related to development of the BD-5 homebuilt aircraft, under circumstances in which further research and development was necessary in order to perfect certain subassemblies of BD-5 homebuilt aircraft. Therefore, the acts and practices described in Paragraph Fourteen are deceptive.

PAR. 15. In the further course and conduct of their business, respondents have represented that the BD-5 homebuilt aircraft may be easily and safely flown by an inexperienced pilot.

In truth and in fact, respondents' representations with respect to pilot skill and experience are based on design inference and expectations rather than upon actual flight experience sufficient to evaluate requisite pilot proficiency. Respondents lack a reasonable basis for representations with respect to such requisite pilot skill and experience, and have failed to disclose that the representations made are not based upon actual flight experience sufficient to evaluate requisite pilot proficiency. Therefore, the acts and practices described in Paragraph Fifteen are unfair and deceptive.

PAR. 16. The aforesaid false, misleading and deceptive representations made by respondents, have the tendency or capacity to mislead substantial number of consumers, and to induce said consumers to purchase substantial quantities of products from respondents and respondents' licensees or franchisees based upon such tendency or capacity to mislead.

PAR. 17. In the further course and conduct of their business, respondents have entered into agreements, or otherwise obligated themselves to refund payments and deposits received from customers; respondents have concurrently agreed or otherwise obligated themselves to promptly issue such refunds.

Respondents have consistently failed to issue properly requested refunds. Respondents have engaged in numerous practices designed to deceive customers as to the customer's actual right to a refund, the circumstances under which refunds will be made, and the date on which a refund will be made. Respondents have further engaged in practices designed to coerce customers into acquiescing to refund delay. Respondents have received numerous legitimate refund requests which have gone unsatisfied for in excess of three years.

By so obligating themselves to issue properly requested refunds in a prompt manner and then failing to issue such refunds, and by engaging in the above–enumerated practices designed to resist and

delay issuance of properly requested refunds, respondents have engaged in unfair acts and practices.

PAR. 18. In the further course and conduct of their business, respondents have had the use and benefit of, and have retained substantial amounts of money received as advance payments and deposits as a result of the unfair and deceptive acts as set forth in Count Two, herein.

Respondents have failed to pay interest upon money received as a result of such unfair acts and practices.

By so retaining money received, and by so failing to pay interest, respondents have engaged in unfair acts and practices.

PAR. 19. The acts and practices as herein alleged, are to the prejudice and injury of the public and respondents' competitors, and constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT THREE

Alleging violations of Section 5 of the Federal Trade Commission Act, with respect to the BD-5D aircraft. The allegations of Paragraphs One through Four hereof are incorporated by reference in Count Three as if set forth verbatim.

PAR. 20. In the further course and conduct of their business, respondents have represented that the BD-5D aircraft will be manufactured, assembled, and ready for delivery as of a specified future date. Accordingly, respondents represented that there existed, at the time such representations were made, a reasonable basis for such representations.

In truth and in fact, respondents lack a reasonable basis for representations made with respect to a specific date on which the BD-5D aircraft will be manufactured, assembled and ready for delivery. Respondents lack sufficient knowledge or expertise to predict, *inter alia,* the time necessary for procurement of requisite FAA airframe certification and engine certification, and the time necessary to fully develop, test, perfect and produce an engine capable of meeting respondents' representations with respect to performance, reliability and safety. Therefore, the acts and practices described in Paragraph Twenty are unfair and deceptive.

PAR. 21. In the further course and conduct of their business, respondents have represented that engines and drive systems exist which are capable of certain specifically stated criteria with respect to performance, reliability and safety.

In truth and in fact, engine and drive system assemblies have not

been developed or produced beyond the prototype or experimental stage. Accordingly, no production engines or drive systems exist, meeting respondents' representations with respect to performance, reliability and safety. Respondents have failed to disclose that representations with respect to performance, reliability and safety are based on design inferences and expectations, rather than upon data derived through use and testing of production engines and drive systems. Therefore, the acts and practices described in Paragraph Twenty-One are unfair and deceptive.

PAR. 22. In the further course and conduct of their business, respondents have represented that the BD–5D aircraft can be easily and safely flown by an inexperienced pilot.

In truth and in fact, respondents have failed to disclose that representations with respect to pilot skill and experience are based on inference and expectations rather than upon actual flight experience sufficient to evaluate requisite pilot proficiency. Respondents lack a reasonable basis for representations with respect to such pilot skill and experience, and have failed to disclose that the representations made are not based upon actual flight experience sufficient to evaluate requisite pilot proficiency. Therefore, the acts and practices described in Paragraph Twenty-Two are unfair and deceptive.

PAR. 23. In the further course and conduct of their business, respondents have represented that money deposited or paid for the BD–5D aircraft would be used, directly or indirectly, for further research and development necessary to perfect certain subassemblies of such aircraft.

In truth and in fact, significant amounts of money deposited or paid by buyers of the BD–5D aircraft has been diverted by respondents to research and development with respect to other of respondents products, as well as other uses, not related to development of the BD–5D aircraft, under circumstances in which substantial research and development of the BD-5D aircraft was necessary before production of such aircraft could begin. Therefore, the acts and practices described in Paragraph Twenty-Three are deceptive.

PAR. 24. In the futher course and conduct of their business, respondents have represented that the BD-5D aircraft has been certified or otherwise approved by the FAA.

In truth and in fact, BD-5D aircraft has never been certified or otherwise approved by the FAA. Therefore, the acts and practices described in in Paragraph Twenty-Four are deceptive.

PAR. 25. These aforesaid false, misleading and deceptive representations which have been made by respondents, have the tendency or

capacity to mislead a substantial number of consumers, and to induce said consumers to purchase substantial quantities of products from respondents and respondents' licensees or franchisees based upon tendency or capacity to mislead.

PAR. 26. In the further course and conduct of their business, respondents have promised, otherwise obligated themselves to refund deposits or payments made by respondents' customers on the BD-5D aircraft, if actual production of such aircraft is not commenced by a date specified in the purchase contract, orally, or otherwise; respondents have concurrently agreed or otherwise obligated themselves to promptly issue refunds should production not commence on the specified date.

Respondents have consistently failed to issue properly requested refunds. Respondents have engaged in numerous practices designed to deceive customers as to the customer's actual right to a refund, the circumstances under which refunds will be made, and the date on which the refund will be made. Respondents have further engaged in practices designed to coerce customers into acquiescing to refund delay. Respondents have received numerous legitimate refund requests which have gone unsatisfied for in excess of three years.

By so obligating themselves to issue refunds and then failing to issue such refunds in a prompt manner and by engaging in the above-enumerated practices designed to delay and resist issuance of properly requested refunds, respondents have engaged in unfair acts and practices.

PAR. 27. In the further course and conduct of their business, respondents have had the use and benefit of substantial amounts of money received as advance payments and deposits, and retained, as a result of the unfair and deceptive acts as set forth in Count Three, herein.

Respondents have failed to pay interest upon money received as a result of such unfair acts and practices.

By so retaining money received, and by so failing to pay interest, respondents have engaged in unfair acts and practices.

PAR. 28. The aforementioned acts and practices, as herein alleged, are all to the prejudice and injury of the public and respondents' competitors, and constitute unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Commission's Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Bede Aircraft, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with a principal office located at 1128 Sixteenth St., N.W., Washington, D.C.

Respondent Bede General Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with a principal office located at 1128 Sixteenth, St., N.W., Washington, D.C.

Respondent Bede Wing, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with a principal office located at 1128 Sixteenth St., N.W., Washington, D.C.

Respondent James R. Bede is sole stockholder and an officer and director of respondents Bede Aircraft, Inc. and Bede General

Corporation. He is also a stockholder, officer and director of respondent Bede Wing, Inc.

Respondent James R. Bede formulates, directs and controls the acts and practices of respondents Bede Aircraft, Inc., Bede General Corporation and Bede Wing, Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions apply:

The phrase "advance payment or deposit" means a payment or deposit tendered to respondents in connection with the order or sale of any product, under circumstances in which shipment to the buyer will not take place on the same day on which such payment or deposit is tendered;

"authorized official" includes the person appointed as "authorized official" and, consistent with the duties as defined in Section XVII of this order, the person appointed as "substitute authorized official;"

"BD-5 homebuilt aircraft" means any aircraft materially within the design parameters of the single-seat, single-engine aircraft commonly referred to by respondents as the "BD-5," which is advertised for sale or sold for full or partial assembly from a kit or from parts, materials or plans supplied wholly or partially by respondents;

"BD-5D aircraft" means any aircraft materially within the design parameters of the single-seat, single-engine aircraft commonly referred to by respondents as the "BD-5," which is advertised for sale or sold as a production aircraft (as the word "production" is defined herein);

"BD-7 aircraft" means any aircraft materially within the design parameters of the two to four place, low-wing aircraft commonly referred to by respondents as the "BD-7;"

"the company," when appearing in parentheses in the text of any notice or disclosure contained in this order, means that when such notice or disclosure is actually implemented as required by this order, the name of the company giving the notice or disclosure shall be inserted in lieu thereof;

"drop ship order" means an order placed by respondents with some entity other than respondents or respondents' agents, dealers, licensees or franchisees, for the shipment of merchandise directly to respondents' customer;

"FAA" means the Federal Aviation Administration, an agency of the United States Government;

"FmHA loan" means the guaranteed or insured loan applied for by respondents through the Business and Industrial Loan Division of the Farmers Home Administration, United States Department of Agriculture, to be used for funding respondents' production facility in Petersburg, Virginia.

"production" means, in describing any product, that such product is commercially manufactured or fabricated in significant numbers for ultimate distribution or sale in the usual course of business, as opposed to being manufactured or fabricated in small numbers as a model or prototype, or for limited distribution or use not in the usual course of trade;

"proper refund request" means a written notification reasonably calculated to put the refundor on notice that the refundee wishes to exercise a present or future right to a refund. In the latter instance, the refund request becomes "proper" when the right to refund actually vests;

"ship, shipping or shipment" refer to the act by which merchandise is physically placed in possession of the carrier, or if there is no carrier, in possession of the buyer or his agent; or in the case of aircraft, transfer of the FAA title certificate;

"specialized tools, machines or processes" means tools or machines which a homebuilder of average ability and resources would not reasonably be expected to own, or in the case of processes, those which such homebuilder would not be reasonably expected to be capable of personally performing.

"the trustee" means the trustee of the stock of Bede Aircraft, Inc., appointed pursuant to the provisions of this order;

"Xenoah engine" means a 726 cubic centimeter displacement aircraft engine manufactured by Xenoah Company of Japan, and certified by the FAA for aircraft use.

I

It is ordered, That respondents Bede Aircraft, Inc., a corporation, Bede General Corporation, a corporation, Bede Wing, Inc., a corporation, their successors and assigns, and officers and directors; James R. Bede, individually and as an officer and stockholder of said corporations (hereinafter sometimes referred to collectively as "respondents"); and respondents' officers, directors, agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, or through any dealer, licensee or franchisee, in connection with the advertising,

offering for sale, sale, or distribution of homebuilt aircraft kits, production aircraft, aircraft parts and accessories, or any other product or merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Misrepresenting the accuracy, truthfulness or completeness of any financial statement;

(2) Disseminating for any purpose inaccurate, untrue, or deceptively incomplete financial statements;

(3) Disseminating for any purpose financial statements not prepared in accordance with generally accepted accounting standards, unless such statements clearly and conspicuously indicate the particular manner in which they are at variance with generally accepted accounting standards;

(4) Disseminating financial statements for any purpose, until a full and complete independent audit of the books of Bede Aircraft, Inc. is accomplished, and complete financial statements are procured by respondents as a result thereof; *provided, however,* that unaudited financial statements may be used to provide a sophisticated lender or investor such as a bank or governmental agency with interim or in-house financial statements, for the purpose of providing such lender the most current information available;

(5) Disseminating financial statements, for any reason, which are not consistent with the results of the independent audit described in paragraph 4, above;

(6) Misrepresenting the existence, business purpose, financial condition, or probability of successful operation of any business enterprise with which any of respondents is associated;

(7) Representing that a corporation in any way associated with respondents exists, or representing that any such corporation is engaged in business in any way, unless concurrent with such representations there is compliance with all applicable federal, state, and local laws and rules, sufficient to establish the legal existence of such corporation as well as its right and ability to lawfully engage in business;

(8) Failing at any time to provide any business entity with which any of respondents may be associated in an ownership, partnership, joint venture, or other managerial or directorial capacity, with the financial as well as other attributes implied by respondents' representations, as well as with the attributes and requirements imposed by law.

II

It is further ordered, That respondents and respondents' officers, directors, agents, representatives, salesmen, and employees, directly or through any corporation, subsidiary, division, or other device, or through any dealer, licensee or franchisee, in connection with the advertising, offering for sale, sale, or distribution of homebuilt aircraft kits, production aircraft, aircraft parts and accessories, or any other product or merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

(1) Representing that any product is available for immediate shipment unless such product exists within respondents' possession or control in quantity sufficient to meet reasonably anticipated demand, ready for immediate shipment consistent with the represenation made;

(2) Failing to disclose, when such is in fact the case, that any product is not available for immediate delivery, is not being manufactured as a production product, or is subject to further research and development, or failing to disclose any other facts bearing materially upon respondents' current or prospective ability to deliver such product;

(3) Making any representations regarding the shipping dates or shipping schedules with respect to any product unless prior to making such representations respondents have a reasonable basis therefor; *provided further,* that the data constituting such reasonable basis must be documented and retained by respondents for inspection by the staff of the Commission for a period of three years after such representation is made;

(4) Misrepresenting performance criteria or characteristics of any product or making any representations with respect to the performance criteria or characteristics of any product without a documented reasonable basis therefor; *provided further,* that the date constituting such reasonable basis must be documented and retained by respondents for inspection by the staff of the Commission for a period of three years after such representation is made;

(5) Making any representations, orally or in writing, regarding performance criteria or characteristics with respect to any product that is not a "production" product as defined herein, unless concurrently with such representations the following notice is disclosed in a clear and conspicuous manner:

THE (name of product) IS SUBJECT TO FURTHER TESTING AND DEVELOP-

MENT; DESIGN AND PERFORMANCE MAY CHANGE AS FURTHER DEVELOPMENT TAKES PLACE.

(6) Representing that any aircraft or component thereof has been certified or otherwise approved by the FAA, unless such certification or approval has in fact been granted, and unless such representations are consistent with the certification or approval granted;

(7) Failing to honor the purchase price set forth in any contract for the purchase of respondents' products except under circumstances where such failure is necessitated by factors outside respondents' control and where the purchase contract provides adequate notice of such circumstances and their possible effects.

(8) Making any representations with respect to the requisite pilot experience and skill necessary to fly any production aircraft manufactured, advertised for sale, or sold by respondents, unless respondents' representations are consistent with the Type Certification issued by the FAA (as "Type Certificate" is defined by FAA regulations), as well as any limitations imposed by the FAA upon the operation of such aircraft;

(9) Making any representations with respect to the requisite pilot experience and skill necessary to fly any aircraft intended to be assembled from a kit, or any aircraft intended to be a production aircraft but not certified for production by the FAA, unless there exists a reasonable basis for such representation; *provided further,* that the data establishing such reasonable basis must be documented and retained by respondents for inspection by the staff of the Commission, for a period of three years after any such representation is made;

(10) Misrepresenting the pilot skill necessary to fly any aircraft.

(11) Misrepresenting the number of work hours necessary for the assembly of any kit;

(12) Representing that any device is capable of assembly from a kit, within any range or specific amount of time, unless prior to such representation respondents possess a reasonable basis therefor: (a) consisting of representative data obtained from the actual experience of builders of the kit who could be considered average in terms of their experience and accessibility to tools and technical assistance; or (b) if such data is unavailable due to the insufficiency of builders or builder experience, consisting of other data; *provided further,* that the data establishing such reasonable basis must be documented and retained by respondents for inspection by the staff of the Commission, for a period of three years after any such representation is made;

(13) Misrepresenting the number or description of any tools necessary for the assembly of any kit;

(14) Making any representations with respect to the tools or processes necessary for the assembly of any kit, without disclosure of all specialized tools, machines or processes which must be employed to assemble the kit in accordance with respondents' representations and specifications;

III

It is further ordered, That respondents and respondents' officers, directors, agents, representatives, salesmen, and employees, directly or through any corporation, subsidiary, division, or other device, or through any dealer, licensee or franchisee, in connection with the advertising, offering for sale, sale, or distribution of homebuilt aircraft kits, production aircraft, aircraft parts and accessories, or any other product or merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from soliciting or accepting advance payments or deposits in excess of $100:

(1) unless a purchase contract relating to such an advance payment or deposit:

(a) contains the following notice displayed clearly and conspicuously on the front of the contract document;

> NOTICE TO BUYER: THE FEDERAL TRADE COMMISSION'S RULE REGARDING MAIL ORDER MERCHANDISE MAY CREATE CERTAIN RIGHTS FOR YOU, AS WELL AS DUTIES ON THE PART OF THE SELLER. READ THIS ENTIRE CONTRACT.

(b) recites verbatim in a clear and conspicuous manner, the provisions attached to this order as Appendix I; and

(2) unless respondents comply with the contractual provisions required by subparagraph 1(b), above, in all material respects.

IV

It is further ordered, That respondents do forthwith cease and desist from soliciting or accepting advance payments or deposits on products valued in excess of $100 and not within respondents' immediate possession or control, and on products valued in excess of $1,000.

(1) unless such advance payments or deposits are held in escrow by a bank or other duly chartered institution capable of acting in a fiduciary capacity as an escrow agent, and

(2) unless such escrow arrangement is conducted pursuant to an escrow agreement between respondents and the escrow agent, meeting the specifications set forth in Section VI, herein.

V

It is further ordered, That respondents and respondents' officers, directors, agents, representatives, salesmen, and employees, directly or through any corporation, subsidiary, division, or other device, or through any dealer, licensee or franchisee, in connection with the advertising, offering for sale, sale, or distribution of homebuilt aircraft kits, production aircraft, aircraft parts and accessories, or any other product or merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from advertising for sale, selling, or otherwise soliciting the purchase of plans or drawings for the assembly or construction of any aircraft or other device:

(1) unless a written contract for the sale of such plans or drawings exists, and contains, in a clear and conspicuous manner on the first page thereof, the following disclosure:

> *(the company)* MAKES NO CLAIMS OR PROMISES EXCEPT THOSE CONTRACTUALLY SPECIFIED, AS TO THE FUTURE AVAILABILITY OF ANY PARTS OR MATERIALS NECESSARY TO ASSEMBLE THIS *(product).* THEREFORE, THE BUYER SHOULD BE AWARE THAT THE FUTURE ABILITY TO PURCHASE SUCH PARTS OR MATERIALS FROM *(the company)* MAY NOT BE GUARANTEED.

(2) unless all information kits and other packages of promotional materials relating to such plans or drawings contain, in a clear and conspicuous manner, the disclosure specified in subparagraph (1), above; and,

(3) unless such plans or drawings contain the following disclosure made clearly and conspicuously on the first page thereof:

> *(the company)* MAKES NO CLAIMS OR PROMISES EXCEPT THOSE CONTRACTUALLY SPECIFIED, AS TO THE FUTURE AVAILABILITY OF ANY PARTS OR MATERIALS NECESSARY TO ASSEMBLE THIS *(product).*

VI

It is further ordered, That respondents, within 60 days after the order becomes final, enter into an escrow agreement with a bank or

other duly chartered financial institution capable of acting in a fiduciary capacity as an escrow agent; *provided further,* that:

(1) Respondents may, with the approval of the trustee, enter into multiple escrow arrangements one each for separate business sites, under circumstances judged by the trustee to be in the best interests of respondents' timely compliance with this order.

(2) Such escrow agreement(s) shall be consistent with the provisions and spirit of this order as well as the specifications set forth below:

(a) Where the provisions of this order require, advance payments or deposits received by respondents shall be immediately transferred to an escrow agent for deposit in an escrow account; such payments or deposits shall be accompanied by a copy of the applicable sales contract;

(b) The escrow agent shall hold funds so deposited, in an escrow account dedicated solely to the escrow agreement; the escrow agent shall disburse funds from the escrow account only under the following circumstances:

(i) If an authorized official provided for in Section XVII of this order, certifies that respondents are rightfully entitled to payment, the escrow agent will be bound to remit to the respondent the proper amount representing merchandise shipped; *provided, however,* such certification shall consist of (1) a statement of the facts entitling respondents to receipt of escrowed amounts, (2) copies of shipping documents or other documents evidencing shipment as defined in this order, or copies of documents evidencing the placement of a drop ship order requiring payment to be made concurrently with the order, and (3) a statement that to the authorized official's best personal knowledge respondents are rightfully entitled to receipt of escrowed funds and respondents' receipt of such funds will be consistent with this order;

(ii) If the buyer identified in a contract accompanying the advance payment or deposit makes written demand on the escrow agent for refund of payments or desposits held in the escrow account, the escrow agent shall be obligated to immediately notify respondent of such demand; at the end of 14 days after such notice to respondent, if respondent has not certified, through an authorized official, that the buyer making the demand is not entitled to a refund, the escrow agent shall be obligated to remit the amount of the refund demanded, up to the face value of the contract relating to such advance payment or deposit;

(c) The escrow account shall not be liable in any way for the expenses and fees of the escrow agenct;

(d) The escrow agent shall maintain for the inspection of the Commission and the trustee, appropriate books, accounts and files documenting all transactions occurring under the escrow agreement, including but not limited to the original copy of each certification by respondents that funds should or should not be released from the escrow account; *provided further,* that such books, accounts and files for each calendar year, shall be retained by the escrow agent for inspection by the trustee or the Commission, for a period of two additional calendar years;

(e) Where the provisions of this order require certification or action by an authorized official or his substitute, the escrow agent shall accept the certification of no other person in lieu thereof, except that of the trustee that the escrow agent shall accept only the statement of the trustee of Bede Aircraft, Inc., as to the identity of such authorized officials.

VII

It is further ordered, That to the extent respondents are obligated to provide refunds for any reason, respondents cause such refunds to be issued within fifteen working days after the right to a refund vests, except as otherwise provided herein.

VIII

It is further ordered, That respondents, to the extent that refunds are not issued within fifteen days after the right to a refund vests, add interest to the refund at an annualized rate of two points over the highest of the prime interest rates offered by large New York banks as posted in the Wall Street Journal at the beginning of each calendar quarter during which such refund is overdue.

IX

It is further ordered, That respondents discharge the customer obligations of Bede Aircraft, Inc., and its subsidiaries in the following manner:

(1) with respect to all persons who have made advance payments or deposits of any amount on the BD-5D aircraft, respondents shall offer the following options:

(a) such persons may elect to receive subject to the provisions of Sections XIII and XIV of this order, a refund of the advance payment or deposit, plus interest from August 1, 1975 or the contract date, whichever is later, until such refund plus accumulated interest is paid in cash or used as credit for the purchase of merchandise;

provided further, that such interest shall be calculated at an annualized rate of two points over the highest of the prime interest rates offered by large New York banks as posted in the Wall Street Journal at the beginning of each calendar quarter for which interest is paid; OR

(b) such persons may elect to reaffirm the order and purchase the aircraft at the wholesale price, which shall be the lowest price at which any of respondents' dealers could or did purchase from respondents such an aircraft in the regular course of business during the 90 days prior to the time full payment is made for purchase of the aircraft.

(c) such election shall be made at the time respondents require execution of the final purchase contract committing the buyer to purchase and respondents to deliver the aircraft, but in no event shall respondents require such election more than six months prior to the production date for the first production BD-5D aircraft scheduled by Creative Industries of Detroit or a substitute subcontractor;

(d) *provided further,* that such persons entitled to make an election under subparagraph (1), above, shall be deemed to have elected option (a) thereof unless option (b) is affirmatively elected in writing.

(2) with respect to all persons who have made advance payments or deposits toward the purchase of, or purchased BD-5 homebuilt aircraft kits as of the date this order becomes final, respondents shall offer the following options:

(a) such persons may elect to reaffirm their orders and receive interest, paid subject to the provisions of Sections XIII and XIV of this order; *provided further,* that such interest shall be calculated in accord with the provisions of subparagraphs (c) through (g), below, and that such interest shall be paid only to those persons who have paid at least the basic purchase price of the complete kit as set forth in the original purchase contract or to their successor(s) in interest; OR

(b) such persons may elect to rescind the purchase contract or contracts applicable to the puchase of BD-5 parts, materials, plans or accessories, and receive a full refund for all parts, materials, plans and accessories returned to respondents in an undamaged and unmodified condition; *provided, however,* that persons who have, as of the date of this order becomes final, been shipped all parts, materials and plans specified in the purchase contract, shall not be eligible for rescission under this subparagraph; *provided further,* that credit for items returned shall be administered in accord with the provisions of subparagraphs (h) through (m), below;

(c) interest provided for in subparagraph (2)(a), above, shall be calculated at a rate of 5% *per annum* of the amount paid or deposited; *provided further,* that such interest shall be calculated from the date on which the owner of the kit took title, until the date on which all parts, plans and materials have been shipped in fulfillment of the contract;

(d) the interest provided for in subparagraph (2)(a), above, shall not exceed $250 with respect to any contract with an original BD-5 aircraft priority number lower than priority number 2501; *provided further,* that interest with respect to all other contracts shall not exceed $150 per contract;

(e) in complying with the provisions of subparagraphs (2)(a) and (2)(d), above, with respect to contracts with a BD-5 aircraft priority number lower than priority number 2501, respondents may require waiver of any rights the recipient of interest may have under the previously stated commitment of Bede Aircraft, Inc. to provide interest as referred to in the "Confidential BD-5 Customer Newsletter" dated March 6, 1972;

(f) the interest provided for in subparagraph (2)(a), above, shall be paid in cash or credit, at the recipient's option;

(g) the interest provided for in subparagraph (2)(a), above, shall inure only to the benefit of the owner of the aircraft or aircraft kit as of the date this order becomes final.

(h) rescission pursuant to subparagraph (2)(b), above, shall be administered as follows: parts, materials, plans or accessories returned pursuant to such subparagraph shall be judged unacceptable for refund only upon the written finding of an authorized official that the items sought to be returned for refund have been modified or damaged to such an extent as to be unusable for the purpose for which they were intended; *provided further,* that in the event of a dispute involving in excess of $100, the matter shall be submitted to the trustee, who shall in his discretion make a final decision; if the subject of the dispute is $100 or less, the decision of the authorized official shall be final; *provided, however,* that the decision of the authorized official as well as the trustee shall be subject to the ongoing compliance review of the Commission;

(i) items returned pursuant to subparagraph (2)(b), above, shall be shipped to respondents, freight paid, with responsibility for packaging and insurance, and risk of loss resting with the sender until the shipment comes within respondents' possession or control; *provided further,* that respondents shall credit the person rescinding, with an amount of additional refund equal to the amount which would be paid by a shipper under the appropriate Interstate Commerce

Commission tariffs for shipment of the parts, materials, plans and accessories judged acceptable for refund from the point from which rescinding person did ship such parts, materials, plans and accessories; *provided further,* such shipping credit shall be given regardless of the manner in which the rescinding party actually effected shipment;

(j) respondents shall credit the person rescinding, with a refund representing the *pro rata* contract value of the parts, plans, materials and accessories judged acceptable for return pursuant to subparagraphs (2)(h), above;

(k) respondents shall credit the account of the person rescinding, with interest from 60 days after this order becomes final until the rescission refund and accumulated interest is paid in its entirety; *provided further,* that such interest shall be calculated at an annual rate of 6% *per annum* of the total rescission refund, including the allowance for shipping;

(l) respondents shall, at least six times over a period of 18 months after the last election of rescission becomes irrevocable, provide free of charge in a mail circulation to all then-current BD-5 homebuilders, as well as in an insert in any BD-5 information kit or package of promotional materials, a reasonable opportunity for all persons electing rescission to advertise or provide notice of their desire to sell or trade any item of value connected with the assembly of the BD-5 aircraft; respondents shall provide to persons electing rescission, at the time such rescission is elected, instructions explaining how such persons may avail themselves of this advertising service;

(m) no sooner than 60 days, and no later than 6 months after this order becomes final, respondents shall, by certified mail, notify all persons electing rescission under subparagraph (2)(b), above, of a return date within 30 days of such notice, after which respondents will process return of parts, materials plans and accessories which are the subject of the rescission; *provided further,* that if a person electing rescission has not shipped such parts, plans, materials or accessories to respondents within 60 days of the return date specified in respondents' notice, such person may be deemed by respondents to have waived the right of rescission under this order and elected interest under subparagraph (2)(a), above;

(n) such persons as are entitled to make an election under subparagraph (2) of this section will be deemed to have elected option (a) unless and until option (b) is elected in writing;

(o) the election of option (b) must take place, if at all, within 60 days after this order becomes final; however, respondents may demand an earlier election in cases where respondents are ready and

willing to make shipment of further kit packages, or back-ordered items, the contract value of which shipment is in excess of $100;

(p) the election of option (a) may not be revoked at any time beyond 60 days after this order becomes final, or after respondents have shipped parts, materials or plans pursuant to an election demanded under (o), above;

(q) the election of option (b) may be revoked at any time prior to the return of parts, materials or plans to respondents for refund; *provided further,* that where option (b) is so revoked, the resulting election of option (a) shall be treated as if made *ab initio.*

(3) With respect to all persons who have made advance payments or deposits toward the purchase of, or have purchased BD-7 homebuilt aircraft kits as of date this order becomes final, respondents shall offer the following options:

(a) such persons may elect to reaffirm their orders and receive interest, paid in the form of cash or credit at the recipient's option subject to the provisions of Sections XIII and XIV of this order; *provided further,* that such interest shall be calculated in accord with the provisions of subparagraph (c), below; OR

(b) such persons may elect to rescind the purchase contract(s) applicable to the purchase of BD-7 parts, materials, plans or accessories, and receive a full refund for all parts, materials, plans or accessories returned to respondents in an undamaged and unmodified condition; *provided, however,* that credit for items so returned shall be administered in accord with the provisions of subparagraphs (d) through (i), below;

(c) the interest provided for in subparagraph (3)(a), above, shall be calculated at a rate of 5% *per annum* of the purchase contract price of each of kit packages 1A, 2, 3, 4 and 5, or the purchase contract price of each of such kit package as was actually purchased, whichever is less; *provided further,* that such interest shall be calculated with respect to each kit package individually, from the date upon which the owner as of the date this order becomes final took title or paid for purchase of such kit package, whichever was later, until the date on which shipment of all elements of each such package is complete in all material respects; *provided further,* that prior to the date this order becomes final, absence of wing spars from package 1A shall not render that package incomplete for the purpose of determining such package's eligibility for calculation of interest;

(d) rescission pursuant to subparagraph (2)(b), above, shall be administered as follows: parts, materials, plans or accessories returned pursuant to such subparagraph shall be judged unacceptable for refund only upon the written finding of an authorized

official that the items sought to be returned for refund have been modified or damaged to such an extent as to be unusable for the purpose for which they were intended; *provided further,* that in the event of a dispute involving in excess of $100, the matter shall be submitted to the trustee, who shall in his discretion make a final decision; if the subject of the dispute is $100 or less, the decision of the authorized official shall be final; *provided, however,* that the decision of the authorized official as well as the trustee shall be subject to the ongoing compliance review of the Commission;

(e) items returned pursuant to subparagraph (2)(b), above, shall be shipped to respondents, freight paid, with responsibility for packaging and insurance, and risk of loss resting with the sender until the shipment comes within respondents' possession or control; *provided further,* that respondents shall credit the person rescinding, with an amount of additional refund equal to the amount which would be paid by a shipper under the appropriate Interstate Commerce Commission tariffs for shipment of the parts, materials, plans and accessories judged acceptable for refund from the point from which rescinding person did ship such parts, materials, plans and accessories; *provided further,* such shipping credit shall be given regardless of the manner in which the rescinding party actually effected shipment;

(f) respondents shall credit the person rescinding, with a refund representing the *pro rata* contract value of the parts, plans, materials and accessories judged acceptable for return pursuant to subparagraphs (2)(h), above;

(g) respondents shall credit the account of the person rescinding, with interest from 60 days after this order becomes final until the rescission refund and accumulated interest is paid in its entirety; *provided further,* that such interest shall be calculated at an annual rate of 6% *per annum* of the total rescission refund, including the allowance for shipping;

(h) respondents shall, at least six times over a period of 18 months after the last election of rescission becomes irrevocable, provide free of charge in a mail circulation to all then-current BD-7 homebuilders, as well as in an insert in any BD-7 information kit or package of promotional materials, a reasonable opportunity for all persons electing rescission to advertise or provide notice of their desire to sell or trade any item of value connected with the assembly of the BD-7 aircraft; respondents shall provide to persons electing rescission, at the time such rescission is elected, instructions explaining how such persons may avail themselves of this advertising service;

(i) no sooner than 60 days, and no later than 6 months after this

order becomes final, respondents shall, by certified mail, notify all persons electing rescission under subparagraph (2)(b), above, of a return date within 30 days of such notice, after which respondents will process return of parts, materials, plans and accessories which are the subject of the rescission; *provided further,* that if a person electing rescission has not shipped such parts, plans, materials or accessories to respondents within 60 days of the return date specified in respondents' notice, such person may be deemed by respondents to have waived the right of rescission under this order and elected interest under subparagraph (2)(a), above;

(j) such persons as are entitled to make an election under subparagraph (3) of this section will be deemed to have elected option (a) unless and until option (b) is elected in writing;

(k) the election of option (b) must take place, if at all, within 60 days after this order becomes final; however, respondents may demand an earlier election in cases where respondents are ready and willing to make shipment of further kit packages, or back-ordered items, the contract value of which shipment is in excess of $100;

(l) the election of option (a) may not be revoked at any time beyond 60 days after this order becomes final, or after respondents have shipped parts, materials or plans pursuant to an election demanded under (k), above;

(m) the election of option (b) may be revoked at any time prior to the return of parts, materials or plans to respondents for refund.

X

It is further ordered, That respondents ship or make a *bona fide* offer to ship all parts, materials, plans and other products, excluding products covered by Section IX, subparagraph (1), of this order, which have been contracted for shipment but not shipped as of the date this order becomes final, within twelve months after this order becomes final or twelve months after the proposed FmHA loan to respondents is funded, whichever is later, but in any event within twenty-four months after this order becomes final.

XI

It is further ordered, That respondents adopt the following procedures with respect to the shipment of engines to the owners of BD-5 homebuilt aircraft or aircraft kits as of the date this order become final:

(1) Such owners of BD-5 homebuilt aircraft or aircraft kits as have contracted with respondents and paid for purchase of an engine

described in such contract as 726 cubic centimeters displacement or larger, shall be given a *bona fide* offer to purchase the Xenoah engine, one per aircraft, at one of the following prices, whichever is less:

(a) the price contracted for as of the date this order becomes final, if such contract was for a Xenoah engine described as 726 cubic centimeters displacement or larger; OR

(b) the sum of the actual cost of the engine FOB the U.S. port of entry, plus 30%, or respondents' wholesale price for such engine, whichever is less;

(2) Such owners of BD-5 aircraft or aircraft kits as are not included within the provisions of subparagraph (1), above, shall be given a *bona fide* offer to purchase the Xenoah engine, one per aircraft, at the following price:

> respondents' wholesale price for such engine, but not more than the sum of the actual cost of the engine FOB the U.S. port of entry, plus 35%;

(3) except as required for shipment of BD-5D aircraft to persons who have, as of the date this order becomes final, paid or deposited money against the purchase of such aircraft, respondents shall not ship Xenoah engines, or cause such engines to be shipped, to any persons other than owners of BD-5 homebuilt aircraft or aircraft kits as of the date this order becomes final, until each of such owners has purchased or been given a *bona fide* offer to purchase such engine.

XII

It is further ordered, That respondents ship or make a *bona fide* offer to ship to all owners of BD-5 homebuilt aircraft or aircraft kits as of the date this order becomes final, parts, plans and materials for fabrication of the BD-5 drive assembly described in respondents' letter to "BD-5 Homebuilders" dated March 31, 1975, subject to the following provisions:

(1) Such parts, plans and materials shall include fully fabricated and formed "shivs" and "overriding clutch;" *provided futher,* that such shivs and overriding clutch shall be equivalent in all technical and mechanical respects to those used in the FAA certified drive assembly for the BD-5D aircraft;

(2) Such parts, plans and materials shall be offered at no extra charge to all such owners of BD-5 homebuilt aircraft or aircraft kits who have not ordered and received, as of the date this order becomes final, all parts, plans and materials necessary for complete assembly and installation of the drive assembly referred to by respondents as the "variable speed drive;"

(3) To the extent that any person eligible to receive such offer has previously paid to or deposited with respondents any amount against the purchase of any drive system or assembly, respondents shall allow full credit for such amount previously paid or deposited, which shall be redeemable in credit or cash at the recipient's option, subject to the provisions of Section XIV of this order.

XIII

It is further ordered, That subject to loan repayment requirements imposed upon respondents by *bona fide* lenders recognized as such by the trustee, respondents assign the highest possible business priority allowed by sound business prudence to the shipment of BD-5D aircraft as provided for in Section IX, subparagraph (1)(b), of this order, and to the shipment of parts, plans and materials as provided for in Sections X, XI and XII of this order; *provided further,* that respondents shall assign business priority subordinate only to that stated above, to the payment of interest and refunds provided for in this order; in any event, respondents shall neither cause nor allow business profits of any corporate respondent to be reinvested beyond those amounts reasonably necessary to ensure the survival of such corporate respondent and promote the timely fulfillment of respondents' obligations under this order; further, respondents shall neither cause nor allow, dividends to be paid, except from subsidiary to parent, on behalf of the stock of Bede Aircraft, Inc., or its subsidiaries, until such time as the trustee shall certify that all of respondents' obligations under Sections IX, X, XI and XII of this order have been discharged.

XIV

It is further ordered, That respondents administer the payment of interest, refunds, and credits, as well as rescission, provided for in Sections IX and XII of this order according to the following provisions:

(1) as funds become available as provided for in Section XIII of this order, an authorized official shall distribute such funds, or inventory purchased with such funds, to the claimants thereof in the most equitable manner possible;

(2) respondents shall, within 90 days after this Order becomes final, but before any distribution of such funds, file with the Commission a plan for distribution; *provided further,* that such plan shall not be implemented until the Commission has notified respondents of its approval thereof.

(3) such distribution plan shall include, *inter alia,* provision for notification of eligible consumers of their rights under this order, and provision for the equitable distribution of funds through shipment of parts, plans and materials, payment of interest and refunds, and allowance of consumers' use of preexisting credits for the purchase of merchandise.

(4) Such distribution plan shall also include respondents' plan or formula for determining the exact refund value of all parts, materials, plans and accessories returned pursuant to rescission under Section IX of this order.

XV

It is further ordered, That respondents not ship BD–5D aircraft to any person not having paid or deposited money against the purchase thereof as of the date this order becomes final, until respondents have shipped or made a *bona fide* offer to ship such aircraft to all persons who have, as of the date this order becomes final, paid or deposited money against the purchase of such aircraft; *provided further,* that respondents shall ship or make a *bona fide* offer to ship BD-5D aircraft strictly on a FIFO schedule, based upon the date on which the contract accompanying the initial payment or deposit against the purchase of the aircraft was executed; *provided further,* that "persons" who have paid or deposited money as required above, shall include the successor(s) in interest to such persons.

XVI

It is further ordered, That respondents undertake the appointment of a trustee who shall hold in trust all outstanding stock of respondent Bede Aircraft, Inc; *provided further,* that such trust arrangement shall be managed as follows:

(1) the instrument creating such trust and providing its terms shall be the document entitled "Security Trust" (hereinafter "the trust agreement"), attached to this order as Appendix II, and made a part hereof;

(2) the grantors of such trust shall be all persons owning or holding stock of any nature in respondent Bede Aircraft, Inc.; such grantors shall upon execution of the trust agreement transfer all right, title, and interest in such stock to the trustee, to be held according to the terms and conditions of the trust agreement.

(3) the trust shall be irrevocable, and shall terminate only upon the occurance of the termination date as defined by the trust agreement.

(4) the trustee shall be qualified and appointed as follows:

(a) the trustee shall be a natural person, experienced as a fiduciary, with substantial business experience and background, possessing a reputation in his community for high ethical character; *in the alternative,* the trustee may be a corporate entity, duly chartered by a public authority and capable of acting as a trustee consistent with the terms of this order;

(b) the first qualified trustee, as well as successor trustees, shall be appointed by a delegate of the grantors, which delegate shall not be a respondent named in this order, and a delegate of the Commission; *provided further,* that if such delegates cannot agree, they shall together appoint a third; a majority of the three shall then select a trustee who shall serve until the termination date of the trust or such time as he shall die, resign, become incapacitated, insolvent, or bankrupt, or be removed as provided in the trust agreement;

(5) respondents shall provide all reasonable cooperation and assistance to the trustee in his exercise of the duties specified in this order;

(6) breach of the trust agreement may be deemed by the Commission a violation of the order by respondent Bede Aircraft, Inc.

XVII

It is further ordered, That respondents provide for the appointment by the trustee of one "authorized official" and one "substitute authorized official" for each of Bede Aircraft, Inc., and its subsidiaries; *provided further,* that:

(1) The trustee may, at his discretion, appoint authorized officials and substitutes for separate business sites used by the parent or its subsidiaries, under circumstances judged by the trustee to be in the best interests of respondents' timely compliance with this order;

(2) Respondents shall defer entirely to the trustee's choices for the appointed authorized officials and substitutes;

(3) Respondents shall provide all reasonable authority, as well as cooperation and assistance, to each authorized official as he exercises the duties specified in this order;

(4) Wherever this order specifies duties to be discharged by an authorized official, the substitute authorized official shall act in, and only in, the absence or incapacity of the authorized official;

(5) In the absence or incapacity of the authorized official, for a period exceeding 14 consecutive calendar days, excluding vacation time or annual leave, respondents shall notify the trustee of such

circumstances and assist the trustee in taking whatever steps he deems necessary under the circumstances;

XVIII

It is further ordered, That respondents make available through written notice, financial statements based upon the independent audit described in Section I, paragraph 4 hereof, to all persons who have extended credit or who are considering extension of credit to respondents, and to federal, state and local government agencies, to whom any financial information purporting to express the financial status or condition of Bede Aircraft, Inc. has been given during calendar years 1976, 1977, and 1978, provided that such persons or agencies agree to maintain the confidentiality of such information in a manner consistent with confidentiality attached to the information previously given such person or agency;

XIX

It is further ordered, That respondents mail to each person to whom the provisions of Section IX hereof apply, the Commission's synopsis of this order in addition to instructions for obtaining a copy of this order from the Commission; *provided further,* that the Commission shall supply copies of such synopsis, and that such synopsis and instructions shall be mailed within 15 dyas after this order becomes final or within 15 days after respondents receive copies of the synopsis, whichever is later.

XX

It is further ordered, That respondents incorporate verbatim the following provision in all dealership contracts between respondents and respondents' dealers, whether such contracts are in effect as of the date this order becomes final or are executed thereafter:

> Dealer agrees to be bound by and observe all applicable provisions of the Order of the Federal Trade Commission issued ———, applicable to the Company. Dealer further agrees that the Company shall have the right to terminate this agreement upon written notice that the Company has determined that the dealer has engaged in an act or practice prohibited by such Order;

XXI

It is further ordered, That respondents send a copy of this decision and order, to each of their present or future employees, salesmen,

dealers, franchisees, licensees and others who sell or promote the sale of respondents' products, and, as to each such person:

(1) Provide them with a form returnable to the respondents and the Commission, upon which they may clearly state their intention to be bound by and conform to the requirements of this order;

(2) Inform them that respondents will not employ any person, or use the services of any person, to sell or promote the sale of any product unless such person agrees to and does file notice with the respondents and the Commission that he or she will be bound by the provisions of this order;

(3) Inform them that respondents are obligated by this order to discontinue dealing with those persons who continue the unfair or deceptive acts or practices prohibited by this order, or who fail to adhere to the affirmative requirements of this order;

(4) Institute a program of continuing surveillance adequate to reveal whether their business operations conform to the requirements of this order;

(5) Promptly discontinue dealing with dealers, or using the services of such persons, including dealers, who:

(a) do not file notice with the respondents and Commission of their intent to comply with, and be bound by, this order;

(b) are revealed by the aforesaid program of surveillance or by any other means to have engaged in an unfair or deceptive act or practice prohibited by this order, or to have failed to adhere to the affirmative requirements of this order.

XXII

It is further ordered, That respondents notify the Commission at least thirty days prior to any change in the corporate respondents, such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance with obligations arising out of this order.

XXIII

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, such respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's

business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

XXIV

It is further ordered, That the provisions of this order shall not operate to abridge or modify any of respondents' obligations arising under the Commission's Trade Regulation Rule with respect to Mail Order Merchandise, 16 CFR 435.

XXV

It is further ordered, That respondents may require as a condition precedent of the receipt of interest or rescission refund under Section IX of this order, that a person receiving same shall agree that such interest as has actually been paid by respondents in the form of cash or through the person's use of credit, be considered partial or complete satisfaction, on a dollar for dollar basis, of any judgment obtained by such person against respondents for breach of the underlying purchase contract if the court awarding the judgment so approves.

XXVI

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Appendix I

(*the company*), hereinafter "the seller," agrees that this transaction shall conform to the provisions of the Federal Trade Commission's Trade Regulation Rule Concerning Mail Order Merchandise, 16 C.F.R. 435, hereinafter "the Rule," regardless of the manner in which the merchandise involved was ordered from seller, whether through the mails or otherwise. Seller agrees that the buyer(s) identified in this contract shall have the right under this contract to enforce the provisions of the Rule as if such provisions were incorporated verbatim in the contract. Seller further agrees that any act or practice on the part of seller in connection with this transaction, which would be a violation of the Rule, shall be a breach of this contract.

The following summary of the Rule is included as a guide to the buyer:

Summary

You have the right to know when you can expect your merchandise to be

shipped. If no specific shipping date is stated by the seller in the contract or somewhere else, you have the right to have your merchandise shipped to you within 30 days. If the seller does not ship your merchandise within the stated time or within 30 days, you have the right to cancel your order.

If the seller can't ship the merchandise to you in the stated time or within 30 days, he must give you the chance to cancel your order and get all of your money back. The seller must notify you of a delay and give you a free means to reply (for example, a postage-paid postcard).

If the shipping delay is 30 days or less, you have the right to cancel the order and get your money back, the right to agree to a new shipping date, or the right not to answer. But if you don't answer, the seller can assume you agree to the shipping delay. If the shipping delay is more than 30 days, you must give your express consent to the delay, otherwise, the seller must return your money at the end of the first 30 days of delay.

If you cancel, you have the right to get all of your money back. The seller must mail your refund to you within seven business days after you cancel your purchase. Where there is a credit sale, the seller has one billing cycle to "adjust" your account.

This summary is an outline of your rights as the buyer. If you need to know more details, a copy of the Federal Trade Commission's Rule Concerning Mail Order Merchandise may be obtained from:

Federal Trade Commission

Office of the Secretary

Distribution and Duplication Branch

Washington, D.C. 20580

APPENDIX II

SECURITY TRUST

THIS Indenture of Trust made as of the ——— day of ———, 19 ——, by and between the shareholders of Bede Aircraft, Inc. listed in the attached Schedule A, hereinafter referred to as "the grantors," and ——— ———, hereinafter referred to as "the trustee."

WHEREAS, it has been suggested by the Federal Trade Commission, hereinafter referred to as "the Commission, " that Bede Aircraft, Inc., hereinafter referred to as "the Company," may have utilized certain undesirable trade practices;

WHEREAS, the grantors, the Company, and the Commission have discussed these allegations and determined that the Company should adopt certain procedures, hereinafter referred to as "the new procedures and policies;"

WHEREAS, the representatives of the scheduled shareholders, the Company, and the Commission have reduced the new procedures and policies to a writing which takes the form of a consent order, hereinafter referred to as "the Order;" and

WHEREAS, the Order contemplates that it will be policed to the extent provided for herein by the independent trustee provided for herein;

NOW THEREFORE, it is agreed that the trustee shall hold the shares of the

Company scheduled in the attached Schedule B, hereinafter referred to as "the scheduled property," IN TRUST according to the terms and conditions hereinafter set forth, for the benefit of the Company and the grantors.

FIRST: In this Indenture the following terms shall have the following meanings where the context so permits:

(1) The term "Company" shall mean the aforesaid Bede Aircraft, Inc., its subsidiaries, Bede General Corporation, Bede Wing, Inc., and all corporations or other business enterprises owned or controlled by the aforesaid Corporation and/or Jame R. Bede;

(2) The term "scheduled property" shall mean the original property listed in Schedule B, all additions to it, and any and all property received by the trustee as a result of his serving as trustee of the trust;

SECOND; The term of this trust shall commence with the date first written above and it shall continue until the occurrence of the first of the following events:

(1) Satisfaction of all of respondents' obligations arising under Sections IX, X, XI and XII of the Order, provided further, that this trust shall not terminate under the provisions of this subparagraph until delivery to the Commission of the joint certification of the trustee and the Company that:

(a) All the Company's customers existent as of the date first written above have received from the Company all products which the Company is obligated to deliver to them as of the date first written above and/or all monies which the Company is obligated to pay them as of the date first written above;

(b) All orders placed with the Company after the day before the date first written above have been substantially filled or dealt with as prescribed by the order; and

(c) The order and this trust have succeeded in bringing the Company to a position where it is able to meet its commitments to its customers without necessitating the continuance of this trust;

(2) The arrival of the last day of existence permitted by the applicable Rule Against Perpetuities; provided further, that the measuring lives governing such rule shall be that of James R. Bede, William R. Bernard, and Kenneth R. Bennington.

The date on which shall occur the first of the above described events shall be known as "the termination date."

THIRD: Upon the occurrence of the termination date, this trust shall terminate and the trustee shall have no further responsibilities other than the delivery of the scheduled property to the grantors or their successors or personal representatives, and the delivery to the Commission of the following:

(1) All outstanding reports due the Commission under the terms of this trust;

(2) A statement setting forth:

(a) The reasons for the trustee's belief that the termination date has occurred, and

(b) His opinion as to whether the Company, its subsidiaries, and/or affiliates have substantially complied with the Order, and if not, why not.

FOURTH: During the continuance of this trust, the trustee shall have the following responsibilities with respect to the scheduled property:

(1) He shall hold the scheduled property in a safe deposit box rented in his name as trustee, or if this is not practicable, in some other place suitable for the safekeeping of the scheduled property;

(2) He shall deliver the scheduled property to anyone who is approved by the Company, the grantors, and the trustee for any purpose approved by all, including but not limited to mergers, consolidations, or other business

reorganization deemed by all to be beneficial or not detrimental to the interests of the grantors and the Company's customers;

(3) He shall deliver the scheduled property as directed by a court of competent jurisdiction under the federal Bankruptcy Act.

FIFTH: During the continuance of this trust, the trustee shall have the obligation to exercise the voting rights associated with and belonging to the scheduled property; however, his discretion with respect to the exercise of such rights shall be limited as follows:

(1) With respect to the election of directors, he shall exercise such voting rights as instructed by the grantors except that:

(a) no more than a majority of directors shall be subject to the prior approval of the grantors, provided further, that in the event that the trustee causes the removal and replacement of a director pursuant to subparagraphs (b) through (d), below, the replacement director shall not be subject to the prior approval of the grantors unless the director so removed was subject to such prior approval.

(b) in the event that he believes that the Company is not complying with the spirit as well as the letter of this Order, he will cause the immediate removal of all directors who are consciously or negligently allowing such non-compliance, and replace them with directors of his choice;

(c) in the event he believes that the Company is not providing him with the information and cooperation he requires to meet his responsibilities under this Indenture of Trust, he will cause the immediate removal of all directors who are consciously or negligently allowing such circumstances to exist, and replace them with directors of his choice;

(d) in the event he believes that officers and directors of the Company receive compensation for their services not reasonably reflecting their duties and value to the Company, as well as the realities of the Company's financial condition and obligations, he will cause the removal of directors who are consciously or negligently allowing such circumstance to exist, and replace them with directors of his choice.

(2) With respect to all other matters requiring shareholders' action, and in particular major corporate actions and reorganizations requiring shareholders' approval, except those arising under the federal Bankruptcy Act, the trustee shall vote against all changes in the status quo unless he has the approval of the grantors;

(3) With respect to matters arising under the federal Bankruptcy Act and requiring shareholders' action, the trustee shall independently exercise such voting rights consistent with his duties under the provisions of subparagraph (4) below;

(4) With respect to all matters requiring or allowing the trustee to exercise rights associated with and belonging to the scheduled property, the trustee shall exercise such rights consistent with his general duties as a fiduciary, given the following limitations and instructions:

(a) He must always exercise such rights in a manner calculated to bring about and preserve the Company's compliance with the Order;

(b) He must always exercise such rights in pursuit of the early termination of this trust as provided for in subparagraph (1) of paragraph SECOND of this Indenture of Trust;

(c) He must always exercise such rights so that if, within his discretion as fiduciary, no other reasonable alternative exists for the successful operation of the Company consistent with the spirit of these limitations and instruc-

tions, he will cause the Company to voluntarily avail itself of any and all appropriate provisions of the federal Bankruptcy Act.

SIXTH: During the continuance of the trust, the trustee shall have the following responsibilities with respect to the business and the operation of the Company:

(1) The trustee shall require quarterly financial reports from the Company; such reports shall be rendered by an independent certified public accountant, and shall include:

(a) a profit and loss statement for the preceding quarter and for the year to date;

(b) a balance sheet as of the date of the profit and loss statement;

(c) a sources and applications of funds statement for the year as of the date of the profit and loss statement;

(2) The trustee shall demand yearly audited financial reports from the Company, consisting of the same components as he must require of the Company quarterly;

(3) Quarterly during the first year of the life of this trust, and twice each year thereafter, the trustee shall have the Company's compliance with the escrow provisions of the Order audited by an independent certified public accountant of his choice. Based upon such audit as well as such other examination as the trustee may deem necessary, the trustee shall compile a written report setting forth his findings with respect to the Company's compliance with the escrow provisions of the Order;

(4) The trustee shall file with the Commission, immediately upon his receipt thereof, copies of all reports specified in subparagraphs (1) and (2), above;

(5) The trustee shall file with the Commission copies of the audit report and trustee's report resulting from the provisions of subparagraphs (3), above, within 60 days after the close of the period which is the subject of the audit;

(6) Upon receipt of the reports specified in subparagraphs (1), (2) and (3), above, the trustee shall review them. If he finds any indications that the Compar.y is not complying with the Order, he shall forthwith make such inquiries as he shall deem necessary to determine whether compliance exists. The trustee shall notify the Commission of his findings in writing and take such steps as are within his powers to assure compliance with the Order.

(7) The trustee shall appoint one "authorized official" and one "substitute authorized official" for each of Bede Aircraft, Inc. and its subsidiaries; provided however, that such authorized official or substitute shall not be an individual respondent named in this order; provided further, that the trustee may, at his discretion, appoint authorized officials and substitutes for separate business sites used by the parent or its subsidiaries, under circumstances judged by the trustee to be in the best interest of respondents' timely compliance with this Order;

(7) In the event of absence or incapacity of an authorized official and his substitute, the trustee shall act in lieu thereof, until such time as the authorized official or his substitute can resume duties, or another is appointed;

(8) Should the trustee learn of the absence or incapacity of an authorized official for a period in excess of 14 calendar days, excluding vacation time, the trustee shall examine such circumstances and determine whether as a matter of his discretion a new authorized official should be appointed; in any event should such absence or incapacity extend to 30 calendar days, the trustee shall apoint a new authorized official, and if necessary a new substitute;

(9) The trustee shall maintain close communication with the authorized officials appointed by him, ascertaining the satisfactory discharge of the authorized officials' duties under the Order, as well as respondents' compliance with this

Order. The trustee shall also, from time to time, demand such reports from the authorized officials as the trustee deems necessary.

(10) The trustee shall take all steps as are within his powers to ensure the company's compliance with the spirit as well as the letter of Section XIII of the Order.

SEVENTH: During the continuance of this trust, the trustee shall have the authority to remove the Company's directors and replace such directors with directors of his choice who will cause the Company to pay the trustee such reasonable fees from the Company's funds as the trustee, the grantors, and the Company shall agree. Such remuneration shall be the amount specified in the attached Schedule C, hereinafter referred to as "the consulting agreement." In no event shall the trustee's compensation be determined by profits or any other measure of the Company's business success. The grantors hereby agree to forfeit any right to object to the use of the Company's funds for purposes of the trustee's remuneration.

EIGHTH: The trustee shall not be liable for breach of trust in connection with the good faith exercise of any discretionary power granted herein. He shall be so liable only for those actions taken by him which are deliberate or negligent breaches of his fiduciary duties and for breaches which occur because the trustee intended to profit improperly from the action or inaction giving rise to the breach. Breach of this trust by the trustee may be deemed by the Commission a violation of the Order by the Company.

NINTH: The Company shall indemnify the trustee for any liabilities which he might incur as a result of serving as trustee under this Indenture, unless such liability arises as a result of a breach of fiduciary duty on the part of the trustee which occurs because the trustee intended to profit improperly from the action or inaction giving rise to the breach.

TENTH: The trustee shall serve until the termination date or until such time as he shall die, resign, become incapacitated, insolvent, or bankrupt, or be removed as hereinafter provided:

(1) If a trustee fails to qualify, or ceases to qualify or act, or is removed, a successor trustee shall be appointed as provided for in section XVI of the Order;

(2) A majority of the grantors may remove a trustee for cause if they notify the Commission at least 21 days in advance of the proposed effective date of such removal, and if they also:

(a) Notify the Trustee at least 21 days in advance of the proposed effective date of such removal;

(b) Describe with particularity in such notice to the trustee and to the Commission, the circumstances giving rise to cause for the trustee's removal;

Once such notice is given by the grantors, the trustee shall continue to serve until such time as removal becomes effective or a successor is qualified and elected, whichever is later. Upon the last day of the trustee's service, the grantors shall tender to the trustee a certified check for an amount equal to all compensation due him.

ELEVENTH: The trustee may resign by delivering in writing to the grantors and to the Commission a notice which states:

(1) The desired effective date of his resignation;

(2) The reasons for his resignation;

(3) A statement of his opinion as to whether or not the Company is complying with the Order; and

(4) A final bill for his services.

In any event, such resignation shall not be effective until his successor is qualified and elected.

TWELFTH: the terms of this trust shall be governed by and construed under the laws of the state in which respondent Bede Aircraft, Inc. maintains its principal place of business.

THIRTEENTH: During the continuance of this trust the trustee shall make available, or cause to be made available for copying and inspection by the Commission and its staff, all books and records of the Company, as well as all books and records of the trustee arising from this trust.

GRANTORS

JAMES R. BEDE (date)

JAMES R. BEDE, TRUSTEE FOR THE BENEFIT OF James M. Bede, Laura J. Bede, Nancy A. Bede, and Jeffrey A. Bede.

Approved and ratified by Bede Aircraft, Incorporated by a resolution of its Board of Directors on the ——— day of ———, 1977.

CHAIRMAN OF THE BOARD (date)

SECRETARY OF THE CORPORATION (date)

TRUSTEE (date)

IN THE MATTER OF

THE RAYMOND LEE ORGANIZATION, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9045. Complaint, July 15, 1977 — Final Order, Nov. 1, 1978

This order, among other things, requires a New York City idea promotion company and two individual parties to cease misrepresenting the nature and value of their services; their qualifications and ability to refine and successfully promote inventions, ideas, and products; and the probability of financial gain to their clients. Respondents are further required to include specified statements in promotional literature and contracts which cite the number of recent customers who achieved financial success through the firm's efforts; disclose that additional costs may be incurred; and advise potential purchasers that the company makes no evaluations as to the patentability and marketability of submissions. Additionally, the order requires respondents to provide purchasers with a ten-day cooling-off period in which to cancel their contracts and receive full refunds.

Appearances

For the Commission: *Harriet Guber Mulhern* and *Myer S. Tulkoff.*

For the respondents: *Malcolm I. Lewin* and *Edgar J. Royce, Lans, Feinberg & Cohen,* New York City for Raymond Lee Organization, Inc. and Raymond Lee and *Michael C. Devine, Schwenke & Devine,* New York City for Lawrence Peska.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Raymond Lee Organization, Inc., a corporation, Raymond Lee, individually and as an officer of said corporation, and Lawrence Peska, individually and as a former officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating charges in that respect as follows:

PARAGRAPH 1. Respondent The Raymond Lee Organization, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 230 Park Ave., New York, New York. Affiliated offices are located at 20 Providence St., Boston, Massachusetts; 230 Peachtree St., N.W., Atlanta, Georgia; 625 North Michigan

Ave., Chicago, Illinois; [2] 4601 Madison Ave., Kansas City, Missouri; 666 Sherman St., Denver, Colorado; 6060 North Central Expressway, Dallas, Texas; 1 Allen Center, Houston, Texas; 5455 Wilshire Boulevard, Los Angeles, California; One Embarcadero Center, San Francisco, California; One Place Ville Marie, Montreal 2, Ontario; and 700 West Georgia St., Vancouver 1, British Columbia.

Respondent Raymond Lee is an individual and is the principal owner and officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

Respondent Lawrence Peska is an individual and a former officer of the corporate respondent and, while an officer, directed, formulated and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time in the past, have been engaged in the advertising, solicitation, offering for sale, sale and distribution of services to inventors and prospective inventors and to other persons with ideas for products in connection with the purported development, advice, and research for patent application, alleged introduction to industry and the purported marketing, sale or licensing of said inventions or ideas.

In the course and conduct of their business, respondents, their employees, agents or representatives, perform preliminary patent searches, prepare patent applications on inventions for submission to the United States Patent Office and to foreign patent offices, and compile "Notices of Invention" for distribution to manufacturers.

COUNT 1

PAR. 3. The allegations of Paragraphs One and Two above are incorporated by reference in Count I as if fully set forth verbatim. [3]

PAR. 4. Respondents have contracted to sell and have sold such services to purchasers located throughout the United States and have caused, and are now causing their services to be advertised, offered for sale and sold by means of newspaper and magazine advertisements, flyers, brochures and other printed literature of interstate circulation as well as by direct personal contact with prospective purchasers through letters, contracts, payments of monies and by other documents and instruments which have been transmitted by means of the United States mail, from respondents' principal place of business in New York State to such prospective purchasers located in numerous other states. There has been present at all times mentioned herein a substantial course of trade in the

sale of respondents' services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business in the sale of services to inventors and to other persons with ideas for products is and has been substantial.

PAR. 5. Respondents are now and at all times mentioned herein have been in substantial competition in or affecting commerce with other corporations, firms and individuals engaged in the advertising, offering for sale and sale of services of the same general kind and nature as those advertised, offered for sale and sold by respondents.

PAR. 6. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their services, respondents have made, and are now making, certain statements and representations in connection with the advertising, offering for sale, sale and distribution of said services. By means of advertisements in various publications of general circulation, other advertising and promotional material, letters mailed to prospective clients, contracts or oral or written sales presentations, respondents have made, and are now making statements and representations regarding respondents' business and professional qualifications and the nature and value of their services. [4]

PAR. 7. By and through the statements and representations alleged in Paragraph Six, herein, respondents have represented, and are now representing, directly or indirectly, that:

1. Respondent Raymond Lee is a registered patent attorney, a registered patent agent, or a licensed attorney.

2. Respondents are qualified or recognized by the United States Patent Office to prepare, file or prosecute applications for patents before said office on behalf of their customers.

3. Purchasers of respondents' services do not need to employ or pay extra fees for the services of outside patent counsel, or other outside specialists, after they have entered into a contract with respondents as respondents provide all the necessary services ranging from patent preparation and prosecution through ultimate marketing of the patented item.

4. Respondents substantially develop or technically refine inventions or ideas for new products submitted to them by their customers.

5. Respondents actively and successfully introduce, promote, and negotiate, on behalf of their customers, with manufacturers who have notified respondents of their interest in acquiring rights to inventions or ideas for new products in the area of the customers' inventions or ideas.

6. Respondents provide potential purchasers of their services

with a fair, adequate and thorough appraisal of the patentability of their inventions or the merit and marketability of their ideas for a new product, on which said potential purchasers can rely prior to contracting with respondents. [5]

7. Respondents act without unnecessary delay on behalf of their customers in an effort to gain patent protection for the customers' ideas or inventions.

PAR. 8. In truth and in fact:

1. Respondent Raymond Lee is not a registered patent attorney, a registered patent agent, or a licensed attorney.

2. Respondents are not qualified or recognized by the United States Patent Office to prepare, file or prosecute applications for patents before said office.

3. Purchasers of respondents' services do need to employ or pay extra fees for the services of outside patent counsel, or other outside specialists, after they have entered into a contract with respondents as respondents do not provide all the necessary services ranging from patent preparation and prosecution through ultimate marketing of the patented item.

4. Respondents, in a significant number of instances, do not substantially develop or technically refine inventions or ideas for new products submitted to them by their customers.

5. Respondents, in a significant number of instances, do not actively and successfully introduce, promote and negotiate, on behalf of their customers, with manufacturers who have notified respondents of their interest in acquiring rights to inventions or ideas for new products in the area of the customers' inventions or ideas.

6. Respondents, in a significant number of instances, do not provide potential purchasers of their services with a fair, adequate and thorough appraisal of the patentability of their inventions or the merit and marketability of their ideas for a new product, on which potential purchasers can rely, prior to contracting with respondents. [6]

7. Respondents, in a significant number of instances, do not act without unnecessary delay on behalf of their customers in an effort to gain patent protection for the customers' ideas or inventions.

Therefore, the statements, representations, acts and practices regarding respondents' qualifications and services as set forth in Paragraph Seven were, and are, false, misleading, deceptive and unfair.

PAR. 9. The use by respondents of the aforesaid false, misleading, deceptive and unfair statements, representatives, acts or practices, as herein alleged, has had, and now has, the tendency and capacity

to mislead and deceive members of the public into the erroneous and mistaken belief that such statements, representations, acts or practices were and are true and complete and into the purchase of respondents' products or services and the payment of respondents' fees by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged are to the prejudice and injury of the public, respondents' competitors, registered Patent Attorneys and Patent Agents and constitute unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 11. The allegations of Paragraphs One through Ten above are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 12. In the further course and conduct of their business, respondents have failed to disclose to potential purchasers of their services the following material facts:

1. That The Raymond Lee Organization, Inc., as the assignee of an interest in its clients' [7] inventions, and in the absence of any agreement to the contrary, may as a joint owner of any resulting patents, make, use or sell the patented invention or license other persons or firms to make, use or sell the patented invention without obtaining the consent of and without accounting to respondents' clients.

2. That respondents are not registered patent attorneys or patent agents and are therefore precluded from preparing, filing or prosecuting patent applications before the United States Patent Office.

PAR. 13. Knowledge of such facts would be of importance to potential purchasers in their evaluation of the nature and value of the services offered by respondents. Thus, respondents have failed to disclose material facts, which if known to potential purchasers, would be likely to affect their consideration of whether or not to enter into a contract with respondents.

PAR. 14. Respondents' failure to disclose material facts, as herein alleged, has had, and now has, the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that such statements, representations, acts or practices were and are true and complete and into the purchase of respondents products or services and the payment of respondents' fees by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents, as herein

alleged are to the prejudice and injury of the public, respondents' competitors, registered Patent Attorneys and Patent Agents and constitute unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT III

PAR. 16. The allegations of Paragraphs One through Fifteen above are incorporated by reference in Count III as if fully set forth verbatim. [8]

PAR. 17. In the further course and conduct of their business, respondents have utilized in various brochures, flyers and in other advertising materials, the names, photographs and quotations of public figures, including members of the United States Congress, a former Mayor of New York City, and other persons, without their knowledge, consent or authorization. In many such instances, general comments made by such persons in correspondence with respondents have been taken completely out of context in such fashion as to mislead prospective purchasers of respondents' services into the erroneous and mistaken belief that the persons so named, pictured or quoted have endorsed or utilized respondents' services or that they have used such services with complete satisfaction.

PAR. 18. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts or practices, as herein alleged, has had, and now has, the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that such statements, representations, acts or practices were and are true and complete and into the purchase of respondents' products or services and the payment of respondents' fees by reason of said erroneous and mistaken belief.

PAR. 19. The aforesaid acts and practices of respondents, as herein alleged are to the prejudice and injury of the public, respondents' competitors, registered Patent Attorneys and Patent Agents and public officials and constitute unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT IV

PAR. 20. The allegations of Paragraphs One through Nineteen hereof are incorporated by reference in Count IV as if fully set forth verbatim. [9]

PAR. 21. Respondents' aforesaid unfair or deceptive acts or

practices have induced and are now inducing persons to pay over to respondents substantial sums of money for contracts whose value to the said persons for services by respondents was and is of little or no value. Respondents have received said sums and have failed to offer to refund, and refuse to refund such money to such persons.

PAR. 22. The use by respondents of the aforesaid practices and their continued retention of the said sums, as aforesaid, is an unfair act or practice in or affecting commerce and a continuing violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

JULY 8, 1977

PRELIMINARY STATEMENT

On July 15, 1975, the Federal Trade Commission issued its complaint in this matter charging the respondents named therein with violation of Section 5 of the Federal Trade Commission Act. The respondents named in the complaint are Raymond Lee Organization, Inc., a corporation, Raymond Lee, an individual and an officer of Raymond Lee Organization, Inc., and Lawrence Peska, an individual and a former officer of Raymond Lee Organization, Inc. Respondents are alleged in the complaint to be engaged in the advertising, solicitation, offering for sale, sale and distribution of services to inventors and prospective inventors and to other persons with ideas for products in connection with the purported development, advice, and research for patent application, alleged introduction to industry and the purported marketing, sale or licensing of said inventions or ideas. In the course and conduct of their business, respondents, their employees, agents or representatives, perform preliminary patent searches, prepare patent applications on inventions for submission to the United States Patent and Trademark Office and to foreign patent offices, and compile and distribute to manufacturers informational brochures or notices concerning said inventions or ideas.

The complaint in Count I charges that respondents for the purpose of inducing the purchase of their services, have, by means of advertisements in various publications of general circulation, in other advertising and promotional materials, in letters and contracts mailed to potential clients, and in oral and written presentations, made statements and representations regarding respondents' business and professional qualifications and the nature and value of their services. By and through the statements and representations it

is alleged that respondents have represented, directly or indirectly that: [2]

(1) Respondent Raymond Lee is a registered patent attorney, a registered patent agent, or a licensed attorney;

(2) Respondents are qualified or recognized by the United States Patent and Trademark Office to prepare, file or prosecute applications for patents before said Office on behalf of their customers;

(3) Purchasers of respondents' services do not need to employ or pay extra fees for the services of outside patent counsel, or other outside specialists, after they have entered into a contract with respondents as respondents provide all the necessary services ranging from patent preparation and prosecution through ultimate marketing of the patented item;

(4) Respondents substantially develop or technically refine inventions or ideas for new products submitted to them by their customers;

(5) Respondents actively and successfully introduce, promote, and negotiate, on behalf of their customers, with manufacturers who have notified respondents of their interest in acquiring rights to inventions or ideas for new products in the area of the customers' inventions or ideas; [3]

(6) Respondents provide potential purchasers of their services with a fair, adequate and thorough appraisal of the patentability of their inventions or the merit and marketability of their ideas for a new product, on which said potential purchasers can rely prior to contracting with respondents; and

(7) Respondents act without unnecessary delay on behalf of their customers in an effort to gain patent protection for the customers' ideas or inventions.

In truth and in fact, it is alleged, the statements and representations were, and are, false, misleading, deceptive and unfair, and have the tendency and capacity to mislead and deceive members of the public into the purchase of respondents' products or services and the payment of respondents' fees.

Count II of the complaint alleges that respondents have failed to disclose to potential purchasers of their services the following material facts:

(1) That The Raymond Lee Organization, Inc., as the assignee of an interest in its clients' inventions, and in the absence of any agreement to the contrary, may as a joint owner of any resulting patents, make, use or sell the patented invention or license other

persons or firms to make, use or sell the patented invention without obtaining the consent of and without accounting to respondents' clients; and [4]

(2) That respondents are not registered patent attorneys or patent agents and are therefore precluded from preparing, filing or prosecuting patent applications before the United States Patent and Trademark Office.

Respondents' failure to disclose these material facts, it is alleged, has had the tendency and capacity to mislead and deceive members of the public into the purchase of respondents' products or services and the payment of respondents' fees by reason of said erroneous and mistaken belief.

Count III of the complaint alleges that respondents have utilized in various brochures and in other advertising materials, the names, photographs and quotations of public figures, including members of the United States Congress, a former Mayor of New York City, and other persons, without such persons' knowledge, consent or authorization. In many such instances, general comments made by such persons in correspondence with respondents have been taken completely out of context in such fashion as to mislead prospective purchasers of respondents' services into the erroneous and mistaken belief that the persons so named, pictured or quoted have endorsed or utilized respondents' services or that they have used such services with complete satisfaction.

The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts or practices, it is alleged, has had the tendency and capacity to mislead and deceive members of the public into the purchase of respondents' services and the payment of respondents' fees by reason of said erroneous and mistaken belief.

Count IV of the complaint alleges that respondents' unfair or deceptive acts or practices have induced persons to pay over to respondents substantial sums of money for contracts for services by respondents, which services were and are of little or no value to said persons, and respondents have failed to offer to refund, and refused to refund such money to such persons. The retention of such sums is alleged to be a continuing violation of Section 5 of the Federal Trade Commission Act. [5]

Respondents Raymond Lee Organization, Inc. (hereinafter "RLO") and Raymond Lee ("Lee") filed their answer to the complaint on October 7, 1975, and respondent Lawrence Peska (hereinafter "Peska") filed his answer on October 6, 1975.

In their answer, RLO and Lee admitted that the corporate respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and that its principal place of business is located at 230 Park Ave., New York, New York 10017. It was further admitted that respondent Lee is an individual and an officer of RLO.

Respondents RLO and Lee further admitted in their answer that individual respondent Lee is not a registered patent attorney, is not a registered patent agent and is not a licensed attorney, and that respondents RLO and Lee are not qualified or recognized by the United States Patent and Trademark Office to prepare, file or prosecute applications for patents before said Office. Respondents RLO and Lee denied all the other charges in the complaint.

Respondent Peska admitted in his answer that he is an individual and a former officer of corporate respondent RLO, and that he was Vice President of RLO from approximately September, 1964 through November, 1972. Respondent Peska denied in his answer all other charges in the complaint, including allegations that he formulated and controlled the acts and practices of RLO during the period of his employment.

In their answer respondents RLO and Lee stated "The alleged practices complained of were the responsibility of respondent Lawrence Peska, whose employment and relationship with RLO was terminated at or about which time the alleged practices complained of ceased" (RLO Ans., p. 4).

Four pretrial conferences were held as follows: November 14, 1975 (PH. Tr. 1–50); February 20, 1976 (PH. Tr. 51–82); April 12, 1976 (PH. Tr. 83–121); and August 5, 1976 (PH. Tr. 122–182). [6]

During the prehearing procedures and the actual trial, several orders of significance were issued. At the prehearing conference held April 12, 1976, the undersigned ruled that complaint counsel must establish a *prima facie* violation of Section 5 by Peska in his capacity as an officer of RLO prior to November 1972, before evidence relating to the activities of Peska and Lawrence Peska Associates, Inc., [1] (hereinafter "LPA") subsequent to November 1972 would be admitted into evidence (PH. Tr. 96–102). This order, orally made at the prehearing conference, was later reiterated in a written order dated August 20, 1976.[2] On October 7, 1976, the undersigned made a determination, and a ruling on the record at the October 7th

[1] Lawrence Peska Associates, Inc. is wholly owned by Lawrence Peska (CX 2607B; Peska, Tr. 4780, 4931–33, 7093, 7175–76).

[2] Order (1) Denying Respondents' ("RLO") Motion for Reconsideration of Motion for Extension of Time or Alternatively for Permission to Appeal to Commission and (2) Certifying to the Commission RLO's Motion for Joinder of Another Party, August 20, 1976, p. 5.

hearing, that a *prima facie* showing of a violation of Section 5 had been made by complaint counsel as to Peska (Tr. 2580–2584, 2620–2631, 2697–2701). Thereafter, complaint counsel was permitted to introduce evidence relating to the conduct, acts and practices of Peska and LPA subsequent to November 1972, for the sole purpose of demonstrating the need for an order applicable to Peska.

By motion filed August 16, 1976, RLO requested that LPA be joined as a respondent in this proceeding. Upon certification, the Commission determined not to joint LPA as a respondent. (Order Denying Motion for Joinder of Another Party, September 13, 1976).

On November 15, 1976, RLO and Lee filed a motion to withdraw this matter from adjudication for the purpose of considering a consent settlement (Motion To Settle Administrative Proceeding, November 15, 1976). Complaint counsel did not execute the proposed consent agreement and opposed the motion to settle the proceeding. After certification of the motion, the Commission determined there was not a likelihood of settlement and denied the motion (Order Denying Respondents Motion To Withdraw Matter From Adjudication, December 14, 1976). [7]

On December 17, 1976, RLO and Lee filed a motion for a mistrial because of complaint counsel's communications with the media during the hearings. Peska submitted a statement supporting the motion for a mistrial. These motions were certified to the Commission and, by order dated April 7, 1977, the Commission denied the motion.

Trial of this matter commenced September 20, 1976 and was completed February 3, 1977. During this period forty (40) days of hearings were held and a total of eighty-six (86) witnesses were heard.[3] Approximately fifteen hundred (1500) exhibits were received in evidence, consisting of several thousand pages, and nearly nine thousand (9,000) pages of transcript are in the record.

Witnesses who testified in this proceeding included an official of the United States Patent and Trademark Office, several public figures, registered patent attorneys, licensing experts, new product officials from industry, consumers, former and current employees of respondents, and the individual respondents. Every opportunity was extended to all parties in this proceeding to present all relevant and material evidence. Respondent Peska's counsel did not elect to participate in all the hearings herein (See Tr. 2578–2583, 2630, for example).

[3] Complaint counsel called fifty-two witnesses, three of whom were recalled for testimony in rebuttal. Respondents called a total of thirty-four witnesses, one of whom was recalled in surrebuttal. Witnesses Peska and Dicks were called by both complaint counsel and respondents.

This proceeding is now before the undersigned for decision based upon the allegations of the complaint, the answers, pleadings, evidence of record, and the proposed findings of fact, conclusions and legal authority submitted by all parties. All proposed findings of fact, conclusions, and arguments not specifically adopted or accepted herein, are rejected as either inappropriate or immaterial. All motions not previously ruled upon, either specifically or as a consequence of this initial decision, are hereby denied. The undersigned, having considered the entire record, makes the following findings of fact, conclusions and issues the order set out at the end hereof. [8]

The findings of fact made herein include references to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are set forth in parentheses, and certain abbreviations, as hereinafter set forth, are used:

Tr. – Transcript, preceded by the name of the witness and followed by the page number.

CX – Commission's Exhibit, followed by number of exhibit being referenced.

RX – Respondent Lee and RLO's Exhibit, followed by number of exhibit being referenced.

RPX – Respondent Peska's Exhibit followed by number of exhibit being referenced.

RLO Ans.– Answer filed on behalf of respondents Lee and RLO.

Peska Ans. – Answer filed on behalf of respondent Peska.

CPF – Complaint Counsel's Proposed Findings.

RPF – Respondents Lee and RLO's Proposed Findings.

RRF – Respondents Lee and RLO's Reply to Complaint Counsel's Proposed Findings. [9]

FINDINGS OF FACT

I. THE RESPONDENTS AND THEIR BUSINESS

A. Identity of Respondents

1. Corporate respondent RLO is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 230 Park Ave., New York, New York 10017. RLO has affiliated offices located in Atlanta, Georgia; Chicago, Illinois; Denver, Colorado; Houston, Texas; Los Angeles and San Francisco, California; Montreal and Vancouver, Canada (RLO, Ans. § 1; Lee, Tr. 439, 445; CX 2805). Some of the RLO offices consisted of only telephone answering services (CX 2790–93, 2805; Lee, Tr. 471; Peska, Tr. 4824).

2. Corporate respondent RLO has affiliated corporations as follows:

> Innovation Resources Corporation, 5455 Wilshire Boulevard, Los Angeles, California 90036, incorporated California 12/27/71;
>
> International Technology Transfer, Ltd., Toronto-Dominion Centre, Toronto, Ontario M5H1A6, incorporated Ontario 12/13/71;
>
> Napatco, Inc., 230 Park Ave., New York, New York 10017, incorporated New York 8/14/75;
>
> Raymond Lee Organization of Colorado, Inc., 666 Sherman St., Denver, Colorado 80203, incorporated Colorado 12/4/72; [10]
>
> Raymond Lee Organization of Texas, Inc., One Allen Center, Houston, Texas 77002, incorporated Texas 11/23/71;
>
> Republic Industries, Inc., 230 Park Ave., New York, New York 10017, incorporated New York 3/5/68;
>
> National Patent & Trademark Company, 898 National Press Building, Washington, D.C., incorporated Washington, D.C. 2/9/65 (CX 2606U, V, W).

Innovation Resources Corporation, International Technology Transfer, Ltd., Raymond Lee Organization of Colorado, Inc. and Raymond Lee Organization of Texas, Inc., are sales agents for RLO. Napatco, Inc. and National Patent Trademark Company offer patent

and trademark services for attorneys; and Republic Industries serves as an advertising agency for handling the advertising of RLO (CX 2606U, V and W; Lee, Tr. 431, 433–34).

3. Individual respondent Raymond Lee is now, and has been since its formation, President and sole stockholder and director of corporate respondent RLO (RLO Ans. § 1; Lee, Tr. 425, 427, 437; CX 2606). In his capacity as President, director and sole stockholder of RLO, Lee was instrumental in formulating, directing and controlling the acts and practices of RLO challenged in this proceeding (Lee, Tr. 444–45, 454–55, 462–65, 5020; Peska, Tr. 4791).

4. Individual respondent Lawrence Peska was, from approximately January 1967 through November 1972, Vice President of corporate respondent RLO and certain RLO subsidiaries and affiliates. From 1964 until RLO's incorporation in 1967, Peska was employed by Raymond Lee and National Patent and Trademark Company (which subsequently became an RLO affiliate corporation) (Peska Ans. ¶ 1, ¶ 3; Peska Affidavit attached to "Motion of Respondent Lawrence Peska for Summary Decision," dated October 31, 1975; CX 374B, 2601Q; Peska, Tr. 4780, 7100). The acts and practices instituted at RLO by Peska and challenged in this proceeding were not substantially changed after Peska's RLO employment terminated. [11] While an officer of RLO, Peska was instrumental in formulating, directing and controlling the acts and practices of RLO challenged in this proceeding (CX 377A–C, 2601Q, ¶ 15; Peska, Tr. 4829, 4846, 7100–01, 7302, 7306–07, 7667; Lee, Tr. 5079, 5085–88; Findings 221–225).

B. RLO's[4] Business Operations

5. RLO has been, and is now, engaged in the business of providing patenting, development and marketing services to inventors and persons with ideas for new products (Lee, Tr. 431–34, 436; CX 2606U, V, W). From 1962 until 1967 Lee operated a sole proprietorship under the name Raymond Lee Organization, which provided services to inventors and persons with ideas for new products similar to those subsequently offered by RLO. RLO was incorporated in 1967 (Lee, Tr. 435–36).

6. RLO solicited clients through advertisements placed in newspapers, magazines, yellow pages of telephone directories, subway posters, brochures and flyers, and correspondence. Among the major newspapers and magazines utilized by RLO are *Popular Mechanics,*

[4] "RLO" as used in subsequent findings detailing allegedly violative acts and practices occurring prior to November 1972 refers to respondents RLO, Lee and Peska collectively. "RLO" used in findings describing acts and practices occurring after November 1972 refers to respondents RLO and Lee.

Mechanics Illustrated, Popular Science, Field and Stream, TV Guide, New York Times, New York News, New York Post, Los Angeles Times, Dallas Times Herald, Chicago Tribune, and *San Francisco Examiner* (CX 2, 3, 7, 12, 13, 15, 20, 22, 24, 26–33; Lee, Tr. 549; Peska, Tr. 4893–94). Prior to 1972, some radio commercials were placed by RLO on local New York stations (Peska, Tr. 4892–93). RLO also conducted seminars in major U.S. cities for inventors for the purpose of acquainting inventors with the inventive process, including the development and marketing of new products, and soliciting clients for RLO (Lee Tr. 466–68). RLO's expenditures for advertising were substantial (CX 3035B, *in camera*).

7. In response to RLO advertisements, potential clients either telephoned an office of RLO or mailed in coupons asking for information, usually the free "Inventors Information Kit," which contained various RLO advertising and promotional materials and [12] a Record of Invention form. Some RLO clients from the New York City region initially contacted RLO by visiting the RLO office in New York City, or by visiting the office after a telephone call to RLO. Out-of-state clients were sent the Inventors Information Kit through the mail (Lee, Tr. 556; Coyle, Tr. 1544). Much of RLO's business is transacted through the mail and by telephone (Finding 24).

8. The Record of Invention form, when completed, constitutes a description of the potential client's invention or idea. A letter is included in the Inventors Information Kit urging an early return of the Record of Invention form to RLO (CX 116, 117, 119, 152, 174, 175). The Record of Invention form, when received at the RLO office, is forwarded to the Account Executive, who is essentially a salesman, responsible for the particular state in which the potential client resided (Coyle, Tr. 1545). If the Record of Invention form was not promptly returned, the Account Executive telephoned the potential client and urged a prompt response as "time is of the essence" (Duber, Tr. 4214). It was the function of the Account Executive to offer to the potential client the services of RLO in connection with his or her idea or invention as reflected on the Record of Invention form. CX 90 and 92 are completed Record of Invention forms.

9. RLO offered potential clients four different types of contracts: a Preliminary Product Research Agreement; a Development Contract; a Marketing Program; and a Canadian Patent and Marketing Program (Coyle, Tr. 1541–42). The usual sequence of events was:

(1) the potential client contacted RLO in response to an advertisement;

(2) the potential client was mailed an Inventors Information Kit with a Record of Invention form enclosed; [13]

(3) the potential client completed and returned the Record of Invention form;

(4) the potential client was first offered the Preliminary Product Research Agreement which called for a search of the records of the United States Patent and Trademark Office to obtain a comparison with other developments in the area of the invention or idea and to provide information about some inventions which already had been developed in the field;

(5) after receipt of the results of the product research, the client was offered a development contract, which included the filing of a patent application and the offering of the invention or idea to industry as soon as patent pending status was obtained;

(6) concurrently with preparation of the United States patent application the client was offered the Canadian Patent and Marketing Program; and

(7) for potential clients who declined to enter into either the Preliminary Product Research Agreement or the development contract or who already had a patent status on the product or idea, a marketing program was offered which consisted of offering the product to industry. [14]

10. The Preliminary Product Research Agreement involves a search of prior patents in the United States Patent and Trademark Office ("Patent Office"). RLO's Preliminary Product Research Agreements are of three types and range in price from $100 to $300 (CX 2600B). A standard preliminary research service, in which a single researcher is assigned to research the records of prior patents in the Patent Office, is the usual contract which is sold to the clients and, in the past, this agreement cost the client $100 (CX 189; Dicks, Tr. 855; Lee, Tr. 4987). The extended research agreement calls for two separate researchers independently searching the records of the Patent Office and presently costs the client $195.00 (Lee, Tr. 4987; Dicks, Tr. 855). The expanded research agreement calls for three independent researchers and costs the client $300 (Dicks, Tr. 855; Lee, Tr. 4987-91). The Preliminary Product Research Agreement is sent to the potential client accompanied by a letter from RLO "suggesting" that the preliminary product research be conducted "at once " (CX 96A, 131).

11. The researchers who conduct the preliminary patent searches are independent contractors located in Washington, D.C. and Virginia, and are paid by RLO approximately $5.00 to $8.00 on a per-

search basis, plus costs for copies, postage and photocopying (Dicks, Tr. 853; Lee, Tr. 4988; CX 2600). The method in which these researchers conduct a patent search for RLO is discussed at the time they are first retained by RLO rather than with reference to each search they conduct (Lee, Tr. 4992).

12. During 1974, approximately 3,819 persons entered into Preliminary Product Research Agreements with RLO, and in 1975 approximately 4,938 persons entered into such agreements (CX 2601D).

13. After the preliminary product research is completed, prior patents located as a result of this patent office search are forwarded to some clients along with a development contract in the form of a letter. Other clients are offered the development contract in person during a visit to RLO's offices. The letter contract enumerates the procedure to be followed by RLO for the development and introduction [15] of the client's idea or invention to industry (see CX 201, 204). The fee for the services outlined in the development contract has ranged from $775 to $2,000, plus an assignment by the client of a ten percent (10%) to thirty percent (30%) interest in the invention to RLO. The usual interest obtained is twenty percent (20%) (CX 100, 2600B). Account Executives follow through, usually by telephone, in an effort to insure that the development contract is executed by the client and returned to RLO.

14. The services to be rendered by RLO, as outlined in the development contract, include:

> (a) RLO will first technically develop and/or refine the invention, if and to the extent necessary, for the preparation of suitable illustrations and description of the commercial features the client regards most important;
>
> (b) RLO will retain a patent attorney on behalf of the joint venture (RLO twenty percent (20%) interest, client eighty percent (80%) interest) to prepare a patent application;
>
> (c) After patent pending status is achieved, RLO will prepare and print a sales letter or prospectus to cover the general functions of the client's proposal;
>
> (d) RLO will introduce the invention to industry by contacting a substantial number of prospective manufacturers to seek opportunities to negotiate for sale or licensing of the invention; [16]
>
> (e) RLO will establish a campaign to publicize the invention for the purpose of stimulating commercial interest; and

(f) RLO will actively negotiate with manufacturers expressing an interest in acquiring rights to the invention.

The development contract further offers the client the right to repurchase RLO's interest in the invention (20%) for $1,000 at any time within six months from the date of the agreement provided an arrangement for the sale or licensing of the invention has not been entered into or completed as of that time (CX 100).

15. The marketing program or Commission Sales Agreement is similar to the development contract except there is no patent application filed. Under the terms of this contract, RLO does not take an assignment of any interest in the invention. RLO's fee for simply introducing an invention to industry ranges from $400 to $600, plus 20% of any proceeds derived from the sale or licensing of the invention (CX 367E–F; Dicks, Tr. 825–26; CX 2600B).

16. A total of approximately 1,498 persons entered into development contracts with RLO in 1974. Approximately 1,585 entered into such contracts in 1975 (CX 2601E). The total number of clients who entered into marketing programs in 1974 was approximately 174; in 1975 the approximate number of clients who entered into this program was 160 (CX 2601E).

17. The Canadian Patent and Marketing Program is customarily offered to clients at or about the time the United States patent application is being prepared (CX 1218, 1543, 1544, 1555, 3084, 3087, Lean, Tr. 8227; Mullen Tr. 1834–35; Gorman, Tr. 2392–93). It is offered to clients on the rationale that it would enable the invention to be marked "U.S. FOREIGN PATENTS PENDING," which may be of added prestige and advantage when offering or publicizing the invention in the United States or Canada (Glass, Tr. 3870–3871; Peska, Tr. 4875–76; CX 3084). In recent years the cost of the Canadian program ranged from approximately $500 to $1,000 (CX 2600B). RLO also [17] retains a twenty percent (20%) interest in the Canadian patent (CX 2600B). The offer of the Canadian program was automatic to all clients who entered into a development contract, and approximately 10% to 15% of such clients purchased the Canadian program (Schwartz, Tr. 4006–07; Duber, Tr. 4222–23).

18. RLO also offered clients a Swiss patenting and marketing program, although the record evidence about this program is not extensive (Guerard, Tr. 3178–82; Peska, Tr. 4875–76).

19. To RLO's best knowledge, the total number of RLO clients who received United States patents on their inventions or ideas was 217 in 1974 and 271 in 1975 (CX 2601E). RLO clients have received a

total of approximately 700 patents since 1972 (Dicks, Tr. 7776-77; RX 659).

20. The total number of clients known to RLO whose ideas or inventions were sold or licensed to industry in 1974 where RLO was an active participant in negotiations for such sale, or where RLO had a financial interest in such idea or invention was zero; the total number of such clients in 1975 was two (CX 2601F-G). Individual respondent Peska testified that approximately "three to four" ideas or inventions of RLO clients were licensed to industry while he was employed there from 1963 through November 1972 (Peska, Tr. 4883-84). The total number of licensing agreements negotiated by RLO on behalf of its clients from 1968 through April 1976 is eight (8).[5] Four of the eight licensing agreements negotiated by RLO covered the fireplace invention of Harold Hannebaum; one licensing agreement was negotiated on behalf of RLO client James Pecorella (Lee, Tr. 5117-19).

21. The total number of clients known to RLO whose total earnings from the sale or licensing of inventions or ideas resulting from marketing efforts by RLO, was zero in 1974. In 1975 one RLO client earned between $1,000 and $1,900 as a result of RLO's marketing efforts (CX 2601G-H).

22. RLO presently makes a disclosure to potential clients in the State of California pursuant to California State Law, Chapter 17 (commencing with Section 22370) to Division 8 of the [18] Business and Professions Code relating to invention development service contracts (CX 2599A-)). RLO's California disclosure document "Copyright 1976 Raymond Lee Organization, Inc." states:

> . . .we have assisted approximately thirty thousand inventors, of which three directly involved us in transactions in which they received, as a result of our services, an amount of money in excess of the fee they paid to us. (CX 2600A)

[5] CX 3037A-B, lists the eight licensing agreements RLO was able to locate in response to the subpoena served on them in this proceeding (Lee, Tr. 5117-19). These licensing agreements are dated August 1968 through April 1976. Complaint and respondents' counsel have both referred to nine licensing agreements but have not corrected CX 3037 to reflect this greater number. Therefore, relying on the official record, the correct number of licensing agreements entered by RLO on behalf of its clients is eight.

23. Total revenue received by RLO is:

1972 - $1,396,264
1973 - $1,241,822
1974 - $1,115,354

1975 - Total revenue received by RLO for 1975 was received *in camera* (CX 2601, 3035; Lee, Tr. 5037).

C. Commerce

24. RLO, in the course and conduct of its business, has been and is engaged in interstate commerce. RLO makes substantial use of the United States mail by mailing brochures, contracts, drawings, correspondence, and other documents to its clients. RLO receives substantial mail from clients in the form of executed contracts, Record of Invention forms, payments for services, and other correspondence. RLO uses the mail to send requests for preliminary product searches and it receives the results of such searches in the mail. Additionally, long distance telephone calls are routinely placed by RLO Account Executives to clients throughout the entire United States. RLO mails prospectuses about clients' inventions to corporations and organizations throughout the United States. It publishes and mails to interested parties magazines containing information about clients' inventions. RLO places numerous advertisements in newspapers and magazines that circulate in interstate commerce. RLO also operates offices in several locations throughout the United States (Findings 1-23 *supra*). [19]

II. REPRESENTATIONS[6] MADE BY RLO TO CLIENTS

A. Advertisements

25. Typical advertisements disseminated by RLO in newspapers, magazines and telephone directories invite the potential client to write or telephone for a free "Inventors Information Kit" and state that RLO will develop the inventor's idea, introduce it to industry and negotiate for a cash sale or royalty licensing. These advertisements also tell the reader about the Record of Invention form and about a brochure entitled "DIRECTORY of 500 CORPORATIONS Seeking New Products." Many of these ads refer to RLO as "the idea people" (CX 2-3, 7, 12-13, 15-16, 19-20, 22, 24-33, 40-42, 2588-92, 3108; Lee, Tr. 5101).

[6] Specific representations challenged in this proceeding are dealt with in detail under separate sections, *infra*. Representations discussed in this section are intended to provide an overview of RLO's representations to potential clients.

26. Examples of advertisements disseminated by RLO state:

INVENTORS: Your ideas and inventions (patented: unpatented) expertly searched, developed for commercial appeal and cash/royalty sales to manufacturers by professional Invention Developer with excellent record of experience. (CX 2, 25)

If you have an idea for a new product or a way to make an old product better, contact us - "the idea people." If your invention is acceptable, we'll develop it for commercial appeal, negotiate for Cash Sale or Royalty Licensing. (CX 19)

[20] . . .professional invention developers with over a decade of experience, integrity and performance. YOUR INVENTIONS AND IDEAS DEVELOPED AND PREPARED FOR CASH/ROYALTY SALES. (CX 24)

DESIGN DRAWINGS PATENT
RESEARCH & MODELS
INVENTIONS
NEW PRODUCTS - NEW IDEAS
PATENTED - UNPATENTED
DEVELOPED & PREPARED for
COMMERCIAL APPEAL and SALES
MANUFACTURED - MARKETED

(CX 40; see also CX 41-42)

27. RLO advertisements frequently stress the qualifications of Raymond Lee as an "Invention Developer" and the founder of RLO (CX 2-3, 7, 24-25, 40) and include references to "success stories" of former RLO clients (CX 30, 32). Other advertisements point out that RLO has "offices throughout the U.S. and Canada" (CX 13, 15, 22, 26).

28. Representations contained in RLO advertisements successfully induced potential clients to contact RLO, either in person, by telephone or mail, and request further information as to RLO's services (Mullen, Tr. 1820).

B. The Inventors Information Kit

29. When a potential client either telephones, personally visits RLO offices or mails in a coupon from an RLO advertisement, he immediately is given or sent a free "Inventors Information Kit." This kit is a folio of various pieces of literature which describe the services rendered by RLO and includes a Record of Invention form on which the potential client may document his invention. The contents of the information kit has changed somewhat over the years (Lee, Tr. 557). If an out-of-state potential client requested such information, it would be mailed to him from RLO's [21] headquarters in New York City (Coyle, Tr. 1544). CX 2604A-K is a typical Inventors Information Kit (Lee, Tr. 560; see also CX 49A-D and CX 52A-F).

30. The outer cover of one RLO brochure included in the Inventors Information Kit states:

For many years, The Raymond Lee Organization has enjoyed the respect and esteem of the business community.

We are proud of our reputation and hope that you will soon join our long list of satisfied clients. (CX 47)

On the inside pages of this brochure, under the title "WORDS OF PRAISE FROM SOME OF OUR CLIENTS" photographs of 20 different persons are reproduced with quotations from said persons expressing their satisfaction with RLO's services. A minister and a nun are included among the photographs, as well as a photograph of Governor and Mrs. Kenneth M. Curtis of the State of Maine. The back panel of this brochure reproduces photographs and quotations of prominent public officials under the caption "A FEW WORDS FROM SOME PROMINENT NATIONAL LEADERS" (see Findings 169 to 184 for details of RLO's unauthorized use of public officials' names, photographs and quotations). An entire page of this brochure consists of a photograph and letter of praise from Judge Roy H. Adams, Bandera County, Texas (CX 47; see also CX 61). A letter used at one time to forward the Inventors Information Kit to prospective clients also included a quotation from Judge Adams' letter (CX 2898).

31. Brochures forwarded to potential clients in the Inventors Information Kit have emphasized the size and international character of RLO's business. For example, CX 68 and 2604, brochures entitled "NOW IT'S YOUR TURN to play the invention game!" state:

We're not just another invention development company. We're the largest organization of our kind with offices coast-to-coast in the United States and Canada.

[22] 32. The most detailed representations made to potential clients in the Inventors Information Kit of RLO's business and services are in the brochure entitled "THE CLIENT AND THE RAYMOND LEE ORGANIZATION" (CX 44). This brochure states:

Our objective, since the founding of The Raymond Lee Organization in 1962, has been personal attention to the needs of inventors and manufacturers. Helping to link these two groups is a staff of highly specialized knowledgeable personnel. . . .Your inquiry to any one of our offices is invited. It will be handled personally, promptly and in complete confidence. (CX 44C)

This brochure further represents:

You may contact an Account Executive. . .and immediately obtain information you require to initiate the development of a new product, idea or innovation. Seemingly

difficult questions and methods of procedure are instantly simplified and stripped of the confusion and complexity ordinarily surrounding them.

This efficiency, accuracy and simplicity requires knowledgeable, responsible, skillful people. We believe this characterizes the Raymond Lee Organization - the desire and ability to be of service. (CX 44E)

In amplifying on the expertise of RLO's staff, this brochure states:

They [Account Executives] are well-educated, highly-trained in their respective fields and have learned [23] their business well. . . . A large and able supporting organization has been built at Raymond Lee to serve your account executive. . .It consists of New Product and Invention Researchers, Commercial and Mechanical Draftsmen, Technical Writers, Public Relations and Publicity Representatives, Advertising Specialists, Market Analysts, Library and Industrial Directory Researchers, Licensing and Sales Negotiators and an extensive group of International Associates. . .the men and women of the Raymond Lee Organization, representing years of seasoned experience have a fresh outlook on the potentialities for tomorrow. (CX 44G)

33. A Record of Invention form is also enclosed in each Inventors Information Kit (CX 52). The inventor is asked to answer certain questions about his idea or invention and provide a written description and drawing thereof on the form. The Record of Invention form is filled out by a potential client prior to his execution of any contract or payment of any monies to RLO (Dicks, Tr. 775), and is to be mailed or brought in person to RLO. Said form contains the following on the front page:

INVENTOR'S STATEMENT AND AUTHORIZATION - I (We) hereby declare that I am (we are) over 21 years of age and declare to all whom it may concern, that the invention described in this document was invented by me (us), and that The RAYMOND LEE ORGANIZATION is hereby authorized to examine the invention described herein for the purpose of receiving its comments and suggestions for the international development and introduction of this invention to industry. (CX 52A).

34. Letters which accompany the Record of Invention form reiterate RLO's claimed expertise with statements such as: [24]

. . . As we are one of the largest companies in this field, our clients have the benefit of dealing directly with an internationally known organization that can provide those services needed for the effective development and sales promotion of their inventions.

You may be assured of the professional skill and integrity of our long established organization and those experts we retain as needed for special services, as well as the careful manner in which your invention will be treated. (CX 50)

. . . Please note the respected credentials of our organization which are among the highest in this industry. They are your assurance of our integrity, experience, and ability to serve you well. (CX 51)

35. In instances where the Record of Invention form is not

returned by a prospective client, RLO uses a CALL-TELEGRAM to spur return of the form. The form states, in part:

. . .Please give me an immediate call-collect. I have three general questions that will help *you* determine the merit of your idea. (CX 2813A)

36. Many RLO clients had little education (Hill, Tr. 2115), and quite a few barely spoke English. A former RLO Account Executive testified:

Q. Did you have any reason to believe anyone you dealt with had any difficulty reading the (RLO) brochures?

A. Quite a few people. [25]

Q. Did they ask you questions about it?

A. I dealt with many people who didn't have much of an education. Quite a few people who barely spoke English. (Schwartz, Tr. 4079–80; see also Bellavista, Tr. 2007)

37. The record is replete with testimony of RLO clients describing the highly favorable impressions they received from the Inventors Information Kit. Clients were very impressed with the documents which describe the background of Lee, the international aspect of RLO, the experience and expertise of RLO, the testimonials of prominent public figures, industrial organizations, governmental agencies, satisfied clients and with the success stories of inventors who have been assisted by RLO(Mullen Tr. 1887–88, 1890; Bellavista, Tr. 2010; Salemi, Tr. 2444; Lart, Tr. 2506; Brody, Tr. 3086; Guerard, Tr. 3152–53; Bucko, Tr. 4358–59, 4388–89; Hawriluk, Tr. 5752–53; Lean, Tr. 8188–89). The entire course of dealing between many RLO clients and RLO is through the mail and over the telephone (Brody, Tr. 3091–92). These brochures and letters therefore have special significance with such clients.

C. During Office Visits

38. Potential clients who visited RLO's offices received the Inventor Information Kit at the time of the visit. One client, Myron S. Shepard, testified regarding favorable impressions he received from the physical surroundings of RLO's offices as follows:

. . .I waited in the waiting room for awhile. Incidentally, before I even entered I was impressed because on the right-hand door, as I recall it, there was a list of five or six offices, branch offices in other cities. In the waiting room I saw, which was very nicely decorated, I saw testimonials, photographs of, I recall one in particular of what purported to be [26] Mr. Lee with former Mayor Lindsay giving him a citation, an award, something. I don't know. On the table in the waiting room there were many brochures, pamphlets of The Raymond Lee Organization with testimonials from

various people as to the services, satisfactory services that Lee had performed for them. . . . (Shephard, Tr. 1911; see also Bellavista, Tr. 2009; Hill, Tr. 2166–67)

D. The Preliminary Product Research

39. An RLO Account Executive receives the Record of Invention form when it is returned by a potential client. If the potential client is located out-of-town, a letter is mailed to the potential client suggesting that RLO be permitted to have preliminary product research performed prior to the client receiving RLO's further recommendations for the development of the invention (CX 96). If the potential client is located in the New York area, an Account Executive telephones the potential client and requests he visit RLO's office to discuss the invention (Traube, Tr. 5149).

40. One former RLO Account Executive testified that in selling the preliminary product rearch he used the following approach:

. . .Good morning, Mr. Jones, this is Bill Coyle from the Raymond Lee Organization. How are you today? Look I have your record of invention form in front of me. It looks like a very interesting idea. How did you happen to think of this? Then I would get an answer back. "Well, look, have you checked the market? Have you looked around in the various stores in your area? Have you seen anything similar to it?" Normally I would get a no. I would say, "Okay." Well, the first step in putting anything on the market is to obtain a search of the U.S. Patent Office. Now, that search would cost you $100. Now, I have a search group [27] of papers going out in approximately five days. What I will do is I will send you copies of the search form and you sign them, send them back to me together with $100 and I'll put that search in. And at the end of about six weeks you'll get the results of the search. Can I send those papers out to you right now, Mr. Jones? (Coyle, Tr. 1529–30)

41. The letter recommending the initiation of a preliminary patent search states that, having examined the inventor's Record of Invention form, RLO now has "an understanding of the objects and purposes of your invention" and suggests a patent search before any further steps to develop, manufacture, sell or license the invention are taken. Potential clients are informed that if a preliminary search is authorized they will receive the confidential results of the research including copies of the patents found as the result of such search as well as RLO's recommendations for development of the invention (CX 96).

E. The Development Contract

42. After the "preliminary product research" is completed, a "development contract" in the form of a letter is forwarded to the potential client along with copies of the prior patents located as the

result of the search (CX 100A–B). Introductory paragraphs of this letter state:

. . .to obtain serious consideration by companies in the field and to maximize the opportunity for success a well-planned program should be initiated.

. . .Since we are Invention Developers, we have assembled a staff and retain, as needed, qualified independent contractors, for carrying out many of the important steps for introducing an invention to industry. (CX 100A) [28]

43. After setting forth the steps RLO will undertake to develop the potential client's invention, RLO's letter contract states:

Your invention will be developed as set forth and outlined above, and we will proceed immediately upon receipt of your approval of these arrangements. Therefore, to have your invention processed at an early date, please promptly return the enclosed reference copies and a copy of this letter, which you are requested to sign below.

III. RLO Represents, But Does Not, Actively And Successfully Introduce, Promote, And Negotiate With Manufacturers Regarding Client's Ideas Or Inventions.

44. Numerous brochures sent to potential RLO clients represent that RLO has special access to corporations who are actively seeking new products through RLO (CX 44, 45, 46, 67, 75, 76, 78, 80, 1082). Such representations are repeated throughout the brochure entitled "THE CLIENT AND THE RAYMOND LEE ORGANIZATION" which lists branch offices in several areas and states that:

. . .in a few short years this company has become known as one of the first and foremost in the field of International New Product Technology.[7] . . .

. . .Each year we are able to handle inquiries from thousands of clients and prospective clients seeking one or more of our services, from Preliminary Product Research, Technical Development and programs that relate to the introduction of their products to industry, to [29] actively seeking new products on behalf of major corporations and assisting in the manufacture and marketing of new product concepts. (CX 44E)

Said brochure further states:

. . .The Raymond Lee Organization maintains its executive offices among the world's leading and most successful corporations. In modern, well-equipped and efficiently managed offices, the executives provide the services required by their clients throughout the world. . . . (CX 44F)

Under the heading "INTRODUCTIONS TO INDUSTRY" said brochure states:

[7] In a letter, signed by Peska, sent to clients making initial inquiry of RLO, the client was told in 1970 that RLO [founded in 1962] was "internationally known," "long established," "steeped in the tradition of providing valuable service," and "has a history of experience and achievement." (CX 152)

We maintain continuous contact with leading companies in the U.S. and abroad, to which new product ideas are submitted on a regular basis. Thus, our Organization is in a position to introduce virtually any new product idea or concept to selected companies in its particular field for review and consideration. (CX 44–0)

Finally, under the heading "SERVICES TO MANAGEMENT CONSULTANTS, CORPORATIONS AND INSTITUTIONS" said brochure states:

New product services have made our name famous, and the financial strength and experience we developed, to serve both novice and professional inventors, have helped us to widen our areas of activity. . . . Our Company has wide experience in searching out new-product concepts. . . We know what it takes to market a product. The research, development, marketing and distribution aspects are interrelated. The expertise gained during our years in this [30] dynamic and burgeoning industry helps us to select new product concepts of interest to progressive companies. We can supplement our clients' search for new product ideas, as well as enhance their existing product capabilities.

Our extensive contacts and our access to private and public sources of new product technology are available to you. We will welcome your inquiries and put skilled men to work in serving your new product needs. (CX 44Q; see also CX 45A–T, 46A–5, 260H).

It would be difficult to imagine a more glowing report of an organization's experience, knowledge, ability, efficiency, capability, integrity, and desire to serve inventors and major corporations seeking new products worldwide than that contained in this brochure.

45. CX 67, an RLO brochure entitled "IDEAS GO TO MARKET . . . THE RLO WAY," contains the photograph of Lee with his signed statement as President of RLO which states:

. . .Industry is now engaged in an international battle for survival. This is why manufacturers throughout the world are seeking new product ideas and inventions which will expand their product lines and areas of distribution.

The Raymond Lee Organization is proud of its participation in the introduction of new product opportunities to manufacturers, and extends to you our very best wishes for your success in the introduction of your invention to industry.

46. RLO's Inventors Information Kit also contained a brochure entitled "500 LEADING CORPORATIONS SEEKING NEW PRODUCTS THROUGH." This statement is in juxtaposition to "The RAYMOND LEE ORGANIZATION, INC.," so that the [31] brochure can be read as stating that 500 leading corporations are seeking new products *through* RLO (CX 78). Other versions of this brochure have eliminated the word "through" (CX 2604F). The brochure also states:

The Raymond Lee Organization has compiled this report to assist industry in its quest for new products and to establish a marketplace for the introduction of inventive and innovative concepts. This is only a partial listing of the many prominent manufactur-

ers who have specifically expressed to The Raymond Lee Organization their desire to consider products in their fields of interest. (CX 78B, 81, 2604)

47. CX 75 and 76 are brochures which set forth complete letters from corporations throughout the United States expressing interest in new products. Individual respondent Peska testified that the names of the corporations appearing in these brochures were obtained by contacting manufacturers and asking them if they were interested in receiving materials from RLO; corporations which responded affirmatively had their names and quotations from such correspondence placed in RLO's brochures (Tr. 4914–15; CX 75, 78, 2604). Many of the letters make it obvious RLO first contacted the corporations offering to provide information to the corporations.

48. CX 80, a brochure entitled "THE RAYMOND LEE ORGANIZATION Internationally Known," contains letters from corporations, clients, and copies of governmental and organizational citations. The cover page of this brochure shows letterheads of various corporations and organizations, including General Motors, Indiana State Bar Association, Massachusetts Institute of Technology, British Consulate General, The Austrian Trade Delegate in the United States, Consulate General of Switzerland, and the Federal Trade Commission. Respondent Lee testified that this montage of letterheads was the result of a compilation of letterheads from correspondence RLO had received and was used to "graphically illustrate the fact that we [RLO] were known internationally amongst various [32] types of organizations of international concept and to illustrate the statement in the copy" (Tr. 5097–99). Mr. Lee further testified that he did not believe RLO had ever licensed a client's invention to any of the organizations whose letterheads were reproduced in this brochure (Tr. 5099).

49. Inclusion of client success stories in RLO's promotional literature helped to reinforce potential client's impressions that RLO would successfully introduce and promote their inventions (Coburn, Tr. 5514). CX 51, a letter accompanying the Inventors Information Kit, states that RLO's credentials are "among the highest in this industry" and are your "assurance of our integrity, experience and ability to serve you well." This letter further states that the brochures included in the kit:

. . .describe some of the inventions with which we have been involved and how we participated in bringing them from an idea to reality.

50. In one RLO brochure, CX 67, under the headline "FIREPLACE INVENTION BRINGS FAME AND FORTUNE TO IDAHO INVENTOR," a photograph of RLO client Harold Hannebaum receiving a royalty

check is reproduced. The brochure contains a quote from Mr. Hannebaum stating:

Dear Mr. Lee:

Much of our success must be credited to your organization which, as a participant in this program, was so careful and precise in the development and processing of this invention. . . . (CX 67B)

51. CX 67 also contains the photograph of RLO client James Pecorella receiving a royalty check, and the reprint of a letter to RLO signed by Mr. Pecorella in which he states:

. . .The Agreement which you negotiated with Technifloor Products, Inc. is very favorable and guarantees to me a substantial income based upon a minimum annual royalty of $7500. (CX 67F; see also CX 66)

[33] Mr. Pecorella did not earn a minimum annual royalty of $7500 and did not compose the depicted letter, although he approved its contents (Pecorella, Tr. 5642, 5645–46, 5651–53; CX 2604B). Further, the company which took a license under Mr. Pecorella's invention was actually contacted by Mr. Pecorella, not RLO (Pecorella, Tr. 5657).

52. CX 64, a brochure which gives several case histories of clients RLO helped to achieve success, contains a two-page story headlined "RAYMOND LEE ORGANIZATION CLIENT RECEIVES $4,000,000 IN STOCK SALE TO ESQUIRE. . ." A careful reading of the two page story reveals that Globe Book Company (the RLO client) received $4,000,000 in Esquire, Inc. stock as a result of Esquire's acquisition of Globe. The brochure does not disclose how obtaining a patent on "programmed reading" by Globe with RLO's assistance relates to the $4,000,000 merger transaction, but the reader is left with the obvious impression that the RLO services are responsible for the $4,000,000 which Globe realized in the merger. The record reflects that RLO did not negotiate a license or sale of an invention for Globe.

53. Account Executives were anxious to sell the services of RLO because a substantial part of their income was based on commissions they received on sales of RLO services. Account Executives testified that more than fifty percent (50%) of their income at RLO was based on such sales (Duber, Tr. 4198–99; Pion, Tr. 8494; CX 639, 647, 655). On occasion, RLO conducted sales contests where Account Executives received bonuses or extra commission on sales during the contest periods (Coyle, Tr. 1519; Duber, Tr. 4198; RX 647). At sales meetings Account Executives' conversion rates were discussed — the percentage arrived at by comparing number of sales to number of clients contacted (Duber, Tr. 4257–60).

54. Former Account Executives confirmed that in order to make sales the impression of success was deliberately created: [34]

* * * * * * *

A. Basically there was always inferences of a hint of a mint. Otherwise we would never be able to sell the programs.

Q. A hint of mint?

A. A hint of mint.

Q. What does that mean?

A. That means to me that we had to infer that money would be made if they would allow us to handle their inventions. (Duber, Tr. 4293–94)

* * * * * * *

. . .You have to tell them there is an opportunity. They are not going to pay $1,500. (Coyle, Tr. 1617)

* * * * * * *

I don't think any inventor would proceed if he didn't think that he had a chance of selling it, in his own mind. (Pion, Tr. 8498)

* * * * * * *

I would do everything I could to get the sale [of preliminary patent search] at least within whatever bounds I thought was ethical. . . If they would say to me, ... "There's no guarantee that I am going to make money out of this," I would say something like, "Well, you'll never know unless you try." If they would [35] say to me, "Well, money is very hard to come by," I would say something like, "Well, you are making an investment." I remember I used that quite a bit. I talked of this as an investment. "You are making an investment in your future. There is no guarantee it will pay off, but it certainly is an investment. It's not like you are spending the money away for a product and throwing your money out." It was those kinds of things. (Switkin, Tr. 1781–82)

55. Gerald Pion, an Account Executive currently employed by RLO, testified that he also discussed success stories of previous RLO clients with prospective clients "[o]nce in a while" (Tr. 6938).

56. Clients testified that they had been given no *guarantee* that their idea or inventions would be patented or successfully marketed, or that the client would make money (Gorman, Tr. 2412; Salemi, Tr. 2482; Brody, Tr. 3140–41; Guerard, Tr. 3214–15). Former Account Executives also generally confirmed that they gave no guarantees or assurances the idea or invention would be successful (Coyle, Tr. 1562–63; Glass, Tr. 3919–21; Schwartz, Tr. 4085–86; Duber, Tr. 4292). Most of this testimony, however, was elicited by questions specifical-

ly directed at whether guarantees, or assurances, or promises were given to clients (Coyle, Tr. 1528, 1623; Gorman, Tr. 2412; Salemi, Tr. 2482; Brody, Tr. 3140–41; Guerard, Tr. 3214–15; Schwartz, Tr. 4085–86; Duber, Tr. 4292–93; Bucko, Tr. 4398; Sarno, Tr. 5348; Lean, Tr. 8264).

57. While no guarantees were extended, clients of RLO were given the clear impression they would probably be successful: [36]

* * * * * * *

A. A guarantee? No. An implication, yes. (Salemi, Tr. 2482).

* * * * * * *

Q. At any time did anyone at (RLO) make any promise to you that you would be able to market or license or sell your invention?

A. I can only say that they inferred that through their development and marketing techniques that it was highly probable that my invention would be patented and marketed. (Giaquinto, Tr. 4575–76)

* * * * * * *

Q. Did anyone at The Raymond Lee Organization at any time give you a guarantee that you would get a patent?

A. No, I didn't receive a guarantee.

Q. Did anyone ever give you any kind of a guarantee you would be able to market your invention?

A. No guarantees.

Q. Did they ever give you any guarantee you would be able to make money from your device?

A. No guarantees, but I thought I would get a patent. I thought they would market my invention and I thought I would be rich by now.

Q. Did anyone at The Raymond Lee Organization tell you you would be rich by now?

A. No. [37]

Q. Did anyone at The Raymond Lee Organization tell you you would have a patent by now?

A. No. This was the impression they gave me, though.

Q. Just an impression?

A. From these letters, yes, from these phone calls. I didn't know any other way to go about marketing, developing, getting a patent for my invention. I saw this. This company took care of everything it seemed. I thought, "Why not go with that?" (Brody, Tr. 3140–41)

57. RLO, through its advertisements, brochures, contracts, letters, telephone conversations, face-to-face meetings - through its entire course of dealing with clients until all contracts have been executed, has represented, directly, indirectly, and by implication, that RLO actively and successfully introduces and promotes its clients' ideas or inventions to industry.

58. Contrary to its representations, RLO has not actively and successfully introduced and promoted its clients' ideas or inventions to industry. From August 1968 to April 1976 only eight licensing agreements were negotiated with industry by RLO on behalf of its clients (CX 3037; Lee, Tr. 5119). Of these eight licensing agreements, four were for the same invention, the Royal Carosel fireplace invented by Harold Hannebaum (CX 3037). In contrast to RLO's represented success on behalf of its clients, only three of RLO's approximately thirty thousand clients have received, as a result of RLO's services, "an amount of money in excess of the fee they paid" to RLO (CX 2600). [38]

IV. RLO REPRESENTS IT WILL, BUT DOES NOT, PROVIDE POTENTIAL CLIENTS WITH A FAIR, ADEQUATE AND THOROUGH APPRAISAL OF THEIR IDEAS OR INVENTIONS.

A. Representations That Appraisal Will or Has Been Made.

59. The folio cover to the Inventors Information Kit states under the heading "Developing Your Idea" that an inventor "may need a marketing specialist to tell you what your proposed product's chances are in the competitive marketplace." The RLO Account Executive, "well educated and highly trained and now a full-time career man in the new-product technology field," will "study your idea honestly and sympathetically without cost or obligation and, depending upon its status, suggest a procedure for commencing its development or commercialization" (CX 49, 2604J).

Brochures included in the Inventors Information Kit and RLO advertisements also indicate RLO will offer the client product evaluation. CX 19, an advertisement in the *New York Times*, December 30, 1973, states:

> . . .If your invention is acceptable, we'll develop it for commercial appeal, negotiate for Cash Sale or Royalty Licensing.

CX 44Q and 2604H brochures in the inventors kit, state:

> . . .The expertise gained during our years in this dynamic and burgeoning industry helps us to select new product concepts of interest to progressive companies.

60. CX 52, the Record of Invention form, states that RLO is being authorized to examine the potential client's invention "for the purpose of receiving its comments and suggestions for the international development and introduction of this invention to [39] industry." A letter accompanying this form states that, after review of the Record of Invention form, RLO will submit a report "with a suggested procedure for commencing the development of your invention" (CX 50). Another letter, CX 51, which RLO sent to potential clients, states that a completed Record of Invention form:

. . .enables us to examine your invention and, without cost or obligation, explain how we would like to proceed. If we cannot accept your invention or idea, we will promptly inform you of our reason.

61. A letter is sent to RLO's potential clients acknowledging receipt of the Record of Invention form and stating that RLO has "*completed our examination of it*" (emphasis supplied). The letter then states to the potential client that:

. . .we would like to suggest that you have the benefit of a comparison with other developments which have been made in this field before you take further steps to develop your invention, to manufacture it or to offer it for sale or licensing to prospective manufacturers.

If you will, therefore, permit us to have preliminary product research conducted at this time, for the relatively modest sum of $100.00, it will be possible to accomplish this. Copies of United States Patents found during this investigation which we will send you will also provide valuable information about some of the inventions which have already been developed in this field. [40]

Within a few weeks after receiving your instructions and remittance concerning this matter, you will receive the confidential results of our findings, including the copies of the reference material located, our recommendations for the development of your invention, and arrangements on which we would accept a participating interest in this program. You should, therefore, have this investigation made at once to avoid unnecessary delay in any future development of your invention.

I know that you are already aware of the importance of time in this matter, so I will look forward to receiving your early instructions. (CX 96A)

This letter goes out to the client along with RLO's Preliminary Product Research Agreement and prior to the execution of any agreement between the client and RLO (Dicks, Tr. 840–42).

62. The Preliminary Product Research Agreement states:

. . .Without any expectations of a prior or subsequent evaluation of these proposals by the RAYMOND LEE ORGANIZATION, INC. or its representatives I am requesting this research for the purpose of providing me with the benefit of personally comparing and evaluating my proposal/proposals with respect to such related U.S. patented inventions as may be located through such research; . . . (CX 201)

This statement is followed by a statement that: [41]

. . .I understand this [Preliminary Product Research Agreement] includes:

1. Examination of proposal/proposals;

Thereafter the following statements appear in the agreement:

. . .These copies and the enumerations of typical procedures of the RAYMOND LEE ORGANIZATION, INC. for the development and introduction of a proposal to industry are for my personal knowledge and evaluation, and shall not be construed as a recommendation based upon an evaluation of my proposal/proposals by the RAYMOND LEE ORGANIZATION, INC. for me to adopt such procedures.

A further statement is included that:

. . .no guarantees could ever be made as to the non-existence of a particular patent, nor should the results be construed as a legal opinion regarding the patentability of the invention. . . (CX 201)

63. In contrast to written statements that no evaluation was made prior to suggesting a preliminary patent search, former Account Executive Paul Duber told prospective clients, in selling Preliminary Product Research Agreements, that RLO thought their ideas were "feasible and marketable."

* * * * * * *

Q. All right. After you received the record of invention form of a client by mail what did you tell such a client about The Raymond Lee Organization's services?

A. Now, I would tell them that we received the record of invention form and that our people think [42] that the idea is feasible and marketable and that we think that we should do some investigation and find out whether we have an opportunity for a patent.

* * * * * * *

. . .In order to do that we would have to send somebody to Washington to check the Patent Office files to see what already existed. . . (Duber, Tr. 4202)

64. Another former Account Executive testified:

JUDGE BARNES: Just what did you say to the client when he came in?

A. I told him I have reviewed the idea and that the company was interested in having a patent search done to see if there was anything that was similar to his particular idea.

* * * * * * *

Q. What was the basis for this statement?

A. It was the normal procedure in the company. This was the instructed procedure in the company.

Q. Well, did somebody in the company communicate to you that this was an idea that the prospect should go ahead with?

A. Every record of invention form that I received on my desk, my job was to call the inventor, invite him in and to explain the search to him or a marketing program based on what was on that, what he filled in on the back of the record form. (Traube, Tr. 5153) [43]

* * * * * * *

Q. Did you ever tell a prospect that the company or you were not interested in his idea or invention?

A. No, sir, I did not. (Traube, Tr. 5154)

65. The development contract makes no direct or specific evaluation as to the patentability or merit and marketability of the client's idea or invention, but states as follows:

You will be pleased to know that we have completed our preliminary product research regarding your invention, and we enclose herewith references which we believe will aid you in your evaluation of it. (CX 100A, 367B–C; Dicks, Tr. 825, 846)

However, the form contract also states:

. . .Accordingly, we would, in return for an assignment of a twenty percent (20%) minority interest in the invention plus a fee of $775.00, proceed with the immediate development of your invention. . . (CX 100A).

Thus, the development contract does clearly indicate that RLO has evaluated the idea, is desirous of taking a twenty percent (20%) interest in the invention, and is ready to proceed immediately. The client is requested to give the matter "your immediate attention" (CX 100B).

66. Former Account Executive William E. Coyle described a typical sales presentation that he would make to encourage a potential client to sign the development proposal, as follows: [44]

* * * * * * *

Mr. Jones, you've had a chance to go over those forms that I sent you so far as the patents are concerned and now you've had a chance to review the marketing proposal that we made. Now, that would run about $1,500. . .whatever it may be. I think we ought to go ahead with this thing, because the more time that you spend thinking about it the more chance there is for someone to come into the Patent Office and get the same idea in ahead of yours. Now, why don't you send me your check, . . . either that or send me a deposit so that we can start to work on it.

Q. Now, if this prospective client said, "Well Mr. Coyle, you told me 'I think you

should go ahead with this thing.' On what basis were you making this recommendation to me?"

A. On the basis of the fact that the Patent Office had been searched. There was nothing identical, according to the patents that we got, and under those circumstances we felt it was a marketable idea and we could go ahead with it.

JUDGE BARNES: You would tell him that the patent search had not uncovered anything identical?

THE WITNESS: Well, he had the patents right in his own hand for review. [45]

JUDGE BARNES: I asked you would you tell him that? You just said you did.

THE WITNESS: Yes, I would tell him that. (Tr. 1528-29)

67. Mr. Coyle further testified that he was instructed to tell prospective clients that their idea or invention was marketable and that:

. . .Otherwise we wouldn't have sent them the marketing proposal. We cannot guarantee that we are going to market it, but it appears to be something that we think we can sell. Otherwise we would not have sent you that marketing proposal, because we are going to try to make our money on the 20 percent. And if we don't market it, we're not going to get anything. 20 percent of nothing is nothing. (Tr. 1562-63)

68. Mr. Coyle also testified:

. . .Look, this is a marketing proposal and I cannot guarantee that we're going to be able to sell this product to a manufacturer or get a royalty contract, something along those lines. But it does appear that we have a good chance that it is marketable. But I can't guarantee.

Q. You told the clients that it appears to you there was a good chance?

A. Yes.

Q. Did Mr. Si Friedman tell you to tell clients in response to such a question that Raymond Lee Organization thought there was a good chance for marketing? [46]

A. Yes. (Tr. 1616)

* * * * * * *

JUDGE BARNES: Mr. Coyle, as a salesman you couldn't sell this proposal if you told them there was not a good chance, could you?
THE WITNESS: Of course not. You have to tell them there is an opportunity. They are not going to pay $1,500. (Tr. 1617)

69. Mr. Coyle also testified:

* * * * * * *

Q. Were you encouraged to sell searches to everyone?

A. Yes.

Q. Were you encouraged to sell development proposals to everyone?

A. Yes.

Q. Even if you thought the idea was ridiculous?

A. Yes. (Tr. 1527)

70. Former Account Executive Stanley Winter testified that if a potential client asked him his opinion as to the patentability of his idea or invention he would suggest that a preliminary patentability search be conducted. After the search was conducted and the prior patents were presented to the client, Mr. Winter would say that the decision has to be made by the client:

Q. Did any client ever ask you for your opinion as to patentability after the search results were obtained?

A. Certainly, yes. [47]

Q. What did you say to him?

A. I could not give an opinion. I would say to the client that the decision. . .was up to the client.

Q. Did you refer the client at that point in time to any patent lawyer?

A. Absolutely not.

Q. Did you refer this client to any patent agent?

A. No. (Winter, Tr. 1703–04)

71. Former Account Executive Paul Duber described the procedure he followed after the preliminary patent search had been completed:

* * * * * * *

Q. And when you receive these copies of prior patents what did you do?

A. I called the client.

Q. What did you tell the client?

A. Told him that everything looks 'go,' and it looked like it was worthwhile going ahead. I told him that we were ready to start our development program if they were, that we think we have opportunities in all areas and we thought it would be a good idea. . .

* * * * * * *

A. . . .the normal question was that what did our people think? Did we think it was patentable, did we think the idea was still a good one?

Q. What did you say? [48]

A. Yes.

Q. If they asked you, "Is my idea marketable," you said yes?

A. Yes. (Duber, Tr. 4203–04)

72. Although the record is clear that Account Executives never guaranteed that clients would obtain patents, or market their invention, or make money on their invention, the inferences conveyed to clients were that they would make money on their ideas. Mr. Duber testified as follows on cross-examination:

Q. Now, Mr. Duber, while you were a Raymond Lee employee did you ever tell a client that they would be guaranteed a patent?

A. No.

Q. Did you ever make any of those promises or guarantees to a client with respect to the marketability of their invention?

A. No guarantees, no.

Q. Any promises that their invention would be marketed?

A. No.

Q. Did you make any promises to them they would be able to make money from their invention?

A. No. Could you qualify that?

* * * * * * *

JUDGE BARNES: Did he ever tell a client he could make money on an invention? [49]

THE WITNESS: Not directly.

Q. Did you ever hear?

A. Basically there was always inferences of a hint of a mint. [an inference that money would be made] Otherwise we would never be able to sell the programs. (Tr. 4292–93)

73. Former Account Executive Stanley Schwartz testified that he would mention to clients the success RLO had in marketing the carousel fireplace, and ". . .we would discuss the idea that we felt that their product was potentially marketable and sort of left it up in the air that way" (Schwartz, Tr. 4027–39).

74. RLO clients tesified as to the representations made by Account Executives. A very recent client, Jeffrey Lean (contacted RLO in February 1975), testified that after he received the copies of patents located in the preliminary product research, he wanted a second opinion so he visited RLO's offices (Lean, Tr. 8194). The Account Executive he spoke with, Mr. Pion, stated that he believed the invention, a shower curtain holder, to be patentable and a marketable item (Lean, Tr. 8194–96). Mr. Lean testified:

. . .but we both [client and account executive] agreed yes, we have a good thing here. Otherwise, I would have never followed through on this thing. I am not qualified to make decisions to continue with patent applications, that's why I hired somebody else. . . . (Tr. 8265)

75. Mrs. Mullen, whose invention was a marketing cart, testified that her Account Executive thought the invention was "a very marketable product" (Mullen, Tr. 1821, 1832, 1837, 1870–71). Mrs. Mullen further testified that: [50]

* * * * * * *

. . .[I]t was on the basis of what she said that to me I agreed to go ahead. (Tr. 1872; see also Tr. 1873)

75. Mr. Bellavista received a letter stating that the RLO Engineering Department had completed its examination of his Record of Invention, and suggested a meeting for further discussions (CX 742). At the meeting the Account Executive told him it was a "good invention" and "we can make some money out of that invention" (Bellavista, Tr. 2011; see also Tr. 2016). Mr. Bellavista received an identical letter from RLO relating to a second invention submitted to RLO by him. At the meeting with the Account Executive, Mr. Schwartz, Mr. Bellavista was told that the invention, a bathroom toliet paper dispenser, was:

Great, wonderful, that I got both good ideas, that we can just make something. (Bellavista, Tr. 2033)

76. Mary Hill, who presented three ideas to RLO, was told by Peska, in respect to her first idea - a battery-powered pot washer- that it was "very good and that I should continue with it"(Hill, Tr. 2116). Later, a different Account Executive, Mr. Brooke, told her that her other two ideas — a vegetable cleaner and a battery-powered doormat — "were both very, very good ideas, and that I should go ahead with it" (Tr. 2120).

77. RLO client Howard Gorman, whose idea was a moveable

screen for the bottom of swimming pools to be used as a life saving device (Gorman, Tr. 2367), was told by his Account Executive:

A. Well, this woman that day that I went down there she thought it was a very good idea and she thought I should go ahead with it, that it probably would be successful. (Tr. 2412). [51]

Mr. Gorman also testified that, after examining a similar patent uncovered during the preliminary patent search, he:

. . . .didn't think it was close enough to bother mine. Being that I was advised to go ahead with, apply for a patent, I figured (RLO) didn't figure these would knock mine out either. (Tr. 2375–76; CX 1209)

* * * * * * *

THE WITNESS: Well, I knew they looked to see if anything was patented like mine and then I knew this would be sent to (RLO) and I hoped if there was anything close to mine they'd advise me whether I should go ahead or not, which they did. They advised me to go ahead. (Tr. 2430–31)

78. Robert Coburn, whose idea was a body-guard device for automobiles, testified that he was told by Account Executive Nancy Archer that "I think you have a good idea here" (Coburn, Tr. 5495).

79. RLO client Richard C. Bowers, whose idea was a foldable repair creeper for use in repairing automobiles and trucks, testified that he received feedback on his invention from the Account Executive with whom he dealt as follows:

Q. Did Mr. Glass say anything about the market potential of your invention?

A. No, he didn't. He mentioned that if it was patented that they would probably seek owner operators . . . . They would go after this market first, then after the fleet owners. But he never mentioned, you know, money in that sense. [52]

Q. Did Mr. Glass discuss with you the patentability of your invention?

A. No, he didn't.

Q. Well, when you said Mr. Glass was enthusiastic, how did he show his enthusiasm?

A. Well, he showed in the tone of his voice. "You know, you've got a great idea here. We checked supply houses around without disclosing the nature of the invention and there is nothing on it. You know, I think you ought to proceed with it," something of this nature.

Q. Were you encouraged by what he said?

A. Yes, I was (Bowers, Tr. 5706–07).

80. RLO client Patrick Sarno, whose invention was a warning

light device for washing machines, testified that he was encouraged by his conversation with Account Executive Fred Plotnik:

* * * * * * *

A. . . .I showed it to him. He thought it was very good. He says, "can I take it in?" He wanted to show it to somebody. He didn't tell me who. I don't know who he showed it to. He came back and he thought it was a good idea. (Sarno, Tr. 5336)

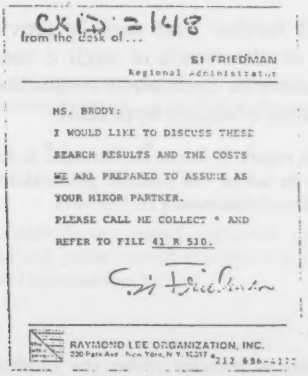
81. After submitting the Record of Invention form on a tiny tots' car seat designed for shopping carts (Brody, Tr. 3111), RLO client Diane Brody received a call from RLO Account Executive Martin Glass who told her she had a: [53]

. . .fantastic idea and they would be very interested in marketing my product and securing a patent for me. He painted a very rosy picture for me. I really believed what he said and he then said that he would go ahead and send me a, I am not sure what I would call it, but it was a contract. (Tr. 3090–91)

After completion of the patent office search, Account Executive Si Friedman told her:

. . .the search results looked very good, that there didn't seem to be anything else that was invented and that had a patent that was the same as my invention, and also he was very enthused on the phone and also said that he had a copy of the contract and they were very ready to go ahead. They also noted in this copy of the contract that they would have a 20 percent interest and I would have an 80 percent interest. It impressed me, because I thought, "Well, gee, this big company would really take a 20 percent interest in my little invention." (Tr. 3099–3100)

82. In June 1974 Ms. Brody received a development proposal from RLO together with the following message from Si Friedman, who at that time was supervisor of all RLO Account Executives (Tr. 6041–42): [54]



CKD: 2148

from the desk of...

SI FRIEDMAN

Regional Administrator

MS. BRODY:

I WOULD LIKE TO DISCUSS THESE SEARCH RESULTS AND THE COSTS WE ARE PREPARED TO ASSUME AS YOUR HIKOR PARTNER.

PLEASE CALL ME COLLECT * AND REFER TO FILE 41 R 530.

Si Friedman

RAYMOND LEE ORGANIZATION, INC.
230 Park Ave New York, N.Y. 10017 • (212 696-4177

After reading the above message, and discussing with Si Friedman the twenty percent (20%) interest which RLO was taking in her invention, Ms. Brody was very impressed: [55]

Well, gee this big company would really take a 20 percent interest in my little invention. (Tr. 3100)

83. RLO client Edward J. Bucko understood RLO's 20% interest in his invention as follows:

. . .I understood that anybody that wants to get 20 percent in my idea must think it was a pretty good idea. If he (RLO) can make a million dollars for me he's entitled to 20 percent. (Tr. 4369)

84. RLO client Herbert M. Lark was told by an Account Executive that his invention, an insulated double automobile roof, "was a feasible idea" and that RLO would not go ahead with a preliminary patent search if RLO "felt that the idea. . .could not be patented or marketed" (Lark, Tr. 2512–13).

85. Dr. Albert Giaquinto was told his idea ". . .sounds like an excellent idea. Yes, we will pursue this. . ." (Giaquinto, Tr. 4496–97).

B. Appraisal as to Patentability

86. Mr. Sears, a Patent Office official and expert in patent matters, testified that he believed:

. . .for the inventor to be serviced in a proper manner he should receive an honest appraisal of patentability, [56] that is, potential patentability from counsel in connection with [a preliminary patent search.] In other words, if the prognosis is negative, we expect the registered practitioner to say so.

If the inventor wants to go ahead anyway, well, that is his choice. (Tr. 1090)

Mr. Sears testified further that merely providing copies of prior patents uncovered as the result of such a search and asking the individual to make his own decision or evaluation as to patentability would not constitute an adequate appraisal.

. . .That is a very sterile report. It forces the inventor to be his own patent counsel. He is not in a position to assess the possible patentability in any objective way, especially on questions of unobviousness. (Tr. 1090–91)

87. The RLO Preliminary Product Research Agreement states that the proposals made to the client by RLO shall not be construed as a "recommendation" or "evaluation" by RLO (see Finding 62). RLO's position stated in its findings is that:

. . .the client, who of course knows his idea and invention best, is the proper and appropriate person to decide whether to proceed after being given substantial information. (RPF, p. 36) [57]

88. No employee of RLO is authorized to render a patentability opinion. RLO and Lee admit that neither RLO nor Lee is authorized, qualified or recognized by the Patent Office to prepare, file or prosecute applications for patents before said Office (RLO Ans., p. 2). Respondents RLO and Lee state in their findings that "clearly, respondents do not advise or appraise with respect to patentability. . ." (RPF, p. 27; Dicks, Tr. 797–801).

89. In the years to and including 1971, RLO apparently prepared the patent application, had a patent attorney sign a power of attorney and filed the patent application for the client. The retained patent attorney never examined the application until it was rejected by the Patent Office (CX 1090; Shreve, Tr. 2851, 2869).

90. Philip Dicks, Manager of RLO's Engineering Department, testified that no evaluation of patentability of a client's idea or invention is made by RLO (Dicks, Tr. 797–98). He further stated that no evaluation of patentability was made by either RLO or the patent attorney retained by RLO at any time prior to filing the patent application in the Patent Office:

Q. . . .when the patents are mailed to the inventor is any evaluation made by the patent attorney who is retained by The Raymond Lee Organization as to patentability?

* * * * * * *

A. No. (Tr. 798)

Q. Is any evaluation made by a patent agent retained by The Raymond Lee Organization after the uncovered patents are mailed to the inventor?

* * * * * * *

A. No. (Tr. 799) [58]

Q. I will restate the question. Is any patent evaluation made, to the best of your knowledge, at any time by any patent agent or patent attorney retained, employed, hired by The Raymond Lee Organization, Inc.

A. No. (Tr. 799–800)

Q. Is any evaluation made by any patent attorney or patent agent or any other

employee of The Raymond Lee Organization prior, that means before, the filing of a patent application by the inventor or jointly by the inventor and The Raymond Lee Organization, Inc. in the United States Patent and Trademark Office?

A. To the best of my knowledge no. (Tr. 801)

91. Daniel Jay Tick, a patent attorney retained by RLO, testified that his "sole obligation is to prepare patent applications on behalf of (RLO) and their clients and to file them (Tr. 1020–21, 1041). He further testified:

Q. In most instances where you are representing (RLO) clients with respect to preparing and filing patents, do you meet with them personally?

A. No, because there is no need to.

Q. Then what is the nature of your contact with the clients of (RLO) that you represent?

A. By mail primarily. [59]

Q. In your communication with (RLO) clients by mail, do you counsel them as to the patentability of the proposed patent?

A. Not before it's prepared, no.

Q. Do you counsel them as to patentability before filing the patent application?

A. No. (Tr. 1023–24)

Mr. Tick further testified that he had never declined to file a patent application for an RLO client (Tr. 1024).

C. Appraisal as to Merit and Marketability

92. Gerald Udell, Director of the Experimental Center for the Advancement of Inventions and Innovations at the University of Oregon, stated it is very important, prior to attempting to market or license an invention, to have an initial evaluation as to merit and marketability:

. . .[I]f ideas are. . .put into the marketplace without a previous analysis or evaluation of the marketability of that idea, you have the problem that the channels become clogged with ideas that lack feasibility. (Tr. 8349)

This results in increased search costs to manufacturers and a highly ineffective approach to marketing an idea (Tr. 8349).

93. Record of Invention forms received from clients apparently are routed through the RLO Engineering Department before going to Account Executives (Coyle, Tr. 1512–13; Winter, Tr. 1695; Glass,

Tr. 3847–48; Duber, Tr. 4209–10; Dicks, Tr. 4705–06). Mr. Dicks, Manager of RLO's Engineering Department, testified as follows: [60]

* * * * * * *

Q. Is potential marketability one of the factors taken into consideration in reviewing these record of invention forms? (Dicks, Tr. 4743)

* * * * * * *

A. Again I think the question is one that's open to varying definition, what will eventually become a marketable item is not definable.

Q. You are not answering the question, Mr. Dicks. Is potential marketability one of the factors taken into consideration in reviewing the record of invention form?. . .

A. Other than what I just said, *no.* I couldn't give you any more answer than that.

Q. Do you review any factors of marketability in your job function as head of the engineering department?

A. No, I don't. (Tr. 4744)

94. Lawrence Peska testified:

Q. Did Mr. Raymond Lee, to the best of your recollection, ever give any written presentation as to marketability of the idea or invention? [61]

A. He never gave an opinion. It was not the policy of the company to give an opinion, so therefore, the decisions, you know, whatever the client decided to go ahead with. The policy of the company was to present the results of the findings. (Tr. 4855)

95. Account Executives testified that when the client's Record of Invention form was received by them for sale of RLO's services to the client, there was no evidence that any evaluation as to marketability had been made (Coyle, Tr. 1512–13; Winter, Tr. 1695; Duber, Tr. 4209–10; Glass, Tr. 3847–48). They further testified that it was RLO's policy to sell a patent search and a development contract on all ideas presented by clients.

96. Former Account Executive David J. Switkin, who made most of his sales by telephone and mail, (Tr. 1777–78), described his conversations with prospective clients as follows:

I would ask the prospective client for details of his invention. . . . Once they disclosed the idea to me I was non-committal or I should say nonevaluative, but I was instructed never to turn anything down, but then from that point to go on and explain that there was this $100 patent search. . .and then based on the results of the search they can decide whether or not they wanted to go into a development phase. (Tr. 1776–77)

97. Former Account Executive Stanley Winter, who was told by his immediate supervisor that the essence of his job was "to sell the

services of the company, not to turn them away" (Winter, Tr. 1698), recalled asking the advice of respondent Lee about a particular invention and was told to accept it: [62]

Q. Did Mr. Lee explain to you why he said you should accept this invention?

A. He gave me an answer. He told me to accept it and. . .he asked me whether or not I wanted to take the responsibility of even if there was something like a million to one chance of this being successful, will I take the responsibility of turning it down, or words to that effect. Obviously I can't reproduce the original conversation. . . (Tr. 1680)

98. Si Friedman, supervisor of Account Executives, testified about criteria used to reject inventions or ideas:

Q. Mr. Friedman, what types of inventions were account executives instructed by you to reject?

A. Inventions which violated accepted scientific principles which would be in the form of perpetual motion, printed matter which has no methodology, a business or a merchandising idea or a cure for a disease or other questionable type things which may verge on the obscene and we may not want to handle. I do not recall if that's all or not. We have a list in the office. (Tr. 6287)

99. Mr. Dicks, Manager of RLO's Engineering Department, testified:

A. There are several types of disclosures of inventions which are rejected by The Raymond Lee Organization. [63] Perpetual motion, cancer cures, printed matter, methods of doing business, simple or changes in only material or size of an existing product on the market. (Tr. 4741)

100. RLO's "SALES PROCEDURE AND ADMINISTRATION MANUAL," Copyright 1973, states:

All Engineering services will be declined for any proposal which purports or appears to be:

A. Contrary to accepted basic scientific principles (perpetual motion, anti-gravity, etc.).

B. A cure for a disease or for regenerating human tissue (cancer cures, hair growers, bust developers, etc.).

C. A method of doing business, conducting various transactions or merchandising techniques.

D. Printed matter exclusive of a particular method, process, formula, or mechanism.

E. Any item of questionable content should be held subject to verification of acceptability. (CX 2602F)

101. Former Account Executive Stephen Traube testified that he was not aware of any RLO policy with respect to the type of inventions that would be rejected:

Q. Well, put it another way: Were you aware of any Raymond Lee Organization policy with the type of inventions that would be rejected? [64]

A. No, sir. (Tr. 5170)

102. Former Account Executive William Coyle testified that he was encouraged to sell patent searches and development contracts to everyone and that the only types of inventions rejected by RLO, were "Anything that was obscene or very far out would be rejected, but it would have to be pretty bad" (Tr. 1524–25; see also Tr. 1527, 1549). Mr. Coyle testified that he never saw any written policy or standards for rejection of ideas (Tr. 1644).

103. Former Account Executive Paul Duber testified that he received the same idea from various clients on more than one occasion and he sold patent searches on "every one of them" (Tr. 4227). On occasion, however, he was permitted to reject ideas or inventions, as follows:

Q. Were you permitted to reject ideas or inventions?

A. To a very small degree. If there was something that we thought was nonsensical I would then take it in to Mr. Friedman who was our in-house inventor. . .who would then give it some thought as to which direction we might go or what we might add or subtract from or modify in order to make it an invention. Then I would be told ultimately to go back to my desk and sell this. (Tr. 4244–45)

When queried as to "How often did you tell clients of The Raymond Lee Organization after you received the preliminary patent search results that it was 'go' ", Mr. Duber replied: *"Every time"* (Tr. 4262). (Emphasis added)

104. Current Account Executives were asked during their testimony to recall the criteria used in rejecting inventions. Herbert Peckham stated during his testimony ". . .if it is a merchandising idea or there is no scientific principle for it" (Tr. 7042); "If its just [65] a merchandising idea". . .(Tr. 7044); "The only one we go by is perpetual motion" (Tr. 7046); "Only if it's absurd," "medical cures," "normally, we don't make judgments" (Tr. 7050); and "trademarks" (Tr. 7051). Current Account Executive Gerald Pion, testified that he rejects clients' inventions which are outlandish—"You get something that looks like a straight stick or outlandish—" (Tr. 6942).

105. The record does establish that some ideas or inventions are rejected by RLO. RX 660–670W are letters and names of clients whose ideas or inventions were rejected by RLO during the period

April 1975-December 1976 (Dicks, Tr. 7778). These documents and testimony leave the record unclear as to the date RLO commenced a policy of rejecting some ideas or inventions (Traube, Tr. 5170; Coyle, Tr. 1644; Winter, Tr. 1743), although there is some indication more rejections have been made in the recent past (Dicks, Tr. 4752). The record is clear, however, that the rejections of ideas or inventions were not based on marketability studies, but rather on a general policy of not accepting obviously absurd items.

106. RLO conducts no specific market research to determine the consumer demand for a client's invention or the feasibility or practicality of manufacturing the particular product or invention (Lee, Tr. 5005-06). Eugene Howard, who served as Manager of RLO's Invention Licensing Department from April 1975 through March 9, 1976, testified that he did not evaluate the inventions he was attempting to market in terms of their marketability (Tr. 7497-98). He had no information as to whether RLO ever conducted a marketing survey for a client prior to the time the client entered into a contract with RLO (Tr. 7548). He did recall seeing *one* marketing survey during his tenure at RLO, which survey was performed after the client signed an RLO development contract (Tr. 7549). Mr. Howard's efforts at marketing were to scan the inventions to see if they fit in with a manufacturer's line of products (Tr. 7564-65), send out prospectuses to companies to see what response he could elicit (Tr. 7553) —"You just kind of throw it into the ring and see what comes out" (Tr. 7552). **[66]**

107. The prospectuses mailed to companies were criticized by one licensing expert as failing to give any consideration to the key problem of manufacture that would be involved with a particular invention; whether it can be made, how it can be made, and can it be made economically or will special facilities be needed for manufacture (Lang, Tr. 3417-21).

108. Throughout its course of dealing, RLO has represented, directly, indirectly and by implication that it does provide potential purchasers of its services with a fair, adequate and thorough appraisal of the patentability, merit, and marketability of their ideas or inventions on which said purchasers can rely. In fact, neither RLO or any RLO employee provides potential clients with such an appraisal.

V. RLO REPRESENTS IT WILL, BUT DOES NOT, SUBSTANTIALLY DEVELOP OR TECHNICALLY REFINE ITS CLIENTS' IDEAS OR INVENTIONS

109. RLO's advertisements, brochures and letters refer to RLO as

"the idea people," and represent that RLO will develop the inventor's idea or invention—"developed for commercial appeal and cash/royalty sales to manufacturers (CX 2, 7, 25); "developed & prepared" (CX 3); "Developed-Prepared" (CX 16); "We will develop your idea, introduce it to industry, negotiate for cash sale or royalty licensing" (CX 20, 22, 26, 30, 33); "Developed & Prepared for Commercial Appeal and Sales Manufactured - Marketed" (CX 40; see also CX 41, 42).

110. CX 44, an RLO brochure entitled "THE CLIENT and the RAYMOND LEE ORGANIZATION" which is sent to potential clients in the Inventors Information Kit, gives a glowing summary of RLO's services to clients from the development of an idea to its ultimate introduction to industry. The brochure contains such statements as "Each step of the research, development and marketing process from original instructions to completed transaction, is carefully supervised. . ." In a section of the brochure entitled "INVENTION DEVELOPMENT" it is stated: [67]

> Invention development is one of the most helpful and valuable services available through the Raymond Lee Organization, Inc. Here the objective of the company is to place the invention or new product idea in a suitable form for presentation to industry. Such a program should include preparation of necessary illustrations and written description of the features considered to be most important and valuable for the manufacture and marketing of the concept, . . . (CX 44J)

* * * * * * *

> That is why independent inventors prefer the benefits and advantages of having the direct participation of an organization knowledgeable in the development and introduction of inventions to industry. As international Invention Developers, we have associated with us the facilities and personnel for carrying out the important phases necessary to introduce new product ideas to industry. (CX 44K)

111. CX 47, an Inventors Information Kit brochure, has a letter written by a Texas judge. The letter states in part:

> It is my belief, that if my product cannot be put on the market by the Raymond Lee Organization, it cannot be done (see CX 51 which also utilizes this statement).

112. CX 49, the Inventors Information Kit cover, states that RLO will "help bring your idea from concept to reality." It states that RLO is an organization that seeks out inventors and innovators: [68]

> help[s] them develop their products, and bring them to the attention of interested corporations.

* * * * * * *

> Our organization has a staff and retains, as needed, qualified independent contractors

who are experts in their respective areas – product research, invention development, patent licensing, technical writing and illustration, marketing, and corporate negotiations. (CX 49D)

Under Invention Development it states:

. . .we'll supply you with whatever technical drawings and descriptive copy are required, from preliminary layouts to finished specifications, for presentation of the invention to industry. (CX 49D)

113. CX 50, a letter sent to clients in the Inventors Information Kit, states that:

. . .All services, from the initial examination of the invention, to product research, technical development, the preparation of drawings and promotional material and negotiations with industry are performed by persons experienced in their respective fields." (See also CX 174, 175)

114. CX 53, a brochure in the Inventors Information Kit, states:

After the Invention Developer technically develops and then refines the invention, it can be promptly converted into a patent application, ready for the inventor's signature and filing in the Patent Office. An invention Developer serves another function, too. He usually takes into consideration such factors as industrial preferences, manufacturers' requirements and consumer appeal. [69]

* * * * * * *

. . .If the service required is of a technical nature, where a background in design, development, manufacturing techniques and sales promotion are important, the Invention Developer would be more helpful. (CX 53D; See also CX 54, 55)

115. CX 68, another brochure in the Inventors Information Kit, states that:

. . .Our people can give you assistance and guidance with invention documentation, patent searches, product development and the introduction of your invention to industry. Your representative at RLO will help develop a comprehensive, individualized program for you that is sound and sensible-tailored to the specific needs of your invention. (CX 68A)

116. CX 174, a letter enclosed with the Inventors Information Kit, speaks of the "development" of the client's invention and states:

. . .As we are one of the largest companies in this field, our clients have the benefit of dealing directly with an internationally known organization that can provide those services needed for the effective development and sales promotion of their inventions.

* * * * * * *

. . .Since proper development can favorably influence the sale or licensing of inventions, our services can be of substantial importance to you.

117. The Record of Invention form which is sent to the prospective client in the Inventors Information Kit asks the potential client *"Does your idea or invention require technical development?"* (CX 52C, *emphasis added;* see also CX 90, 92, 2604, 2798 and 2799 for typical Record of Invention forms). [70]

118. Former RLO Account Executive Paul Duber testified that he informed potential clients "I told [them] simply that we [RLO] develop and refine inventions and introduced them to industry" (Tr. 4222).

119. RLO's development contract represents that RLO will technically develop and refine the potential client's idea or invention, as follows:

> I am sure you know that inventions to be offered to industry for sale or licensing first require certain technical development, refinement and safeguards, as well as the preparation of important presentation material. Thus, to obtain serious consideration by companies in the field and to maximize the opportunity for success a well-planned program should be initiated. . . .
>
> * * * * * * *
>
> . . .Since we are Invention Developers, we have assembled a staff and retain, as needed, qualified independent contractors, for carrying out many of the important steps for introducing an invention to industry. Accordingly, we would . . . proceed with the immediate development of your invention as follows:
>
> A. We shall first technically develop and/or refine your invention, if and to the extent necessary, for the preparation of suitable illustrations, and description of the commercial features you regard most important. (CX 100; see also CX 367, 840, 1022, 1208, 2149) [71]

120. RLO contends in its proposed findings that "the obvious focus of this provision [quoted above] is the preparation of sufficiently professional drawings of the consumer's invention to facilitate introduction of the invention to industry and permit the independent patent agent or attorney to use them" (RPF p. 31).

Respondent Lee testified that the services rendered by RLO under Paragraph A of its development contract are "to ultimately have suitable illustrations and description of the commercial features the inventor regards most important" (Tr. 5065). He stated that the embellishment that takes place in the preliminary drawings is to expand the uses and applications of the invention as broadly as possible, to preferably illustrate the invention in a form in which it is actually used, rather than solely its appearance. Lee further testified that ". . . the embellishment, development and refinement of ideas really is all a mental rather than a physical process" (Tr. 5012).

After approval of the drawings is obtained from the client, a

patent attorney receives the papers to prepare a patent application (Lee, Tr. 5066–68; see also Dicks, Tr. 867–68).

121. Philip Dicks, manager of RLO's Engineering Department, testified as to the work done in his department in connection with invention development, as follows:

A. . . .We review record of invention forms for proposed courses of action. When a contract is signed by a client for a development program, then we carry out those portions of the contract which are allotted to the engineering department, preparation of preliminary drawings, contact with patent representatives to have a patent, to have written specifications and claims prepared, correspondence with clients. [72]

Q. This is invention development?

A. I'd have to say in terms of your question these are services that we are contractually obligated to and, therefore, are invention development services. (Tr. 4726)

122. Patent expert Donald R. Dunner testified that if there is more than one inventor, both inventors are required to execute the oath and declaration which accompanies the patent application. Mr. Dunner described the difference between a skilled artist who merely makes changes, suggestions, or modifications of an obvious or trivial nature and when such suggestions or contributions go beyond that point, requiring such person to sign the oath and declaration as a joint or coinventor under 35 United States Code 116. Mr. Dunner testified as follows:

Q. Can you tell us when a person would become a coinventor?

A. Where a person merely contributes obvious suggestions within the limits of a skilled artist in that particular area, where he merely makes changes, suggestions, modifications of a relatively trivial nature, that such a normally skilled person would make, he would not be a coinventor. Where a person makes a suggestion or a contribution which is beyond that point, beyond the level of the normally skilled artisan to the point where what he suggests is embodied in the defined invention, whether it's the whole invention or only a part of the invention, in that situation he would be a coinventor or joint inventor with any other person who similarly made a contribution to that designed invention. (Tr. 3263, 3265–66).

[73] RLO does not execute the oath and declaration which accompanies its clients' patent applications as a coinventor. It can therefore be assumed any modifications to clients' invention suggested by RLO in the drawings prepared for the client are, from its own perspective, relatively trivial.

123. Since RLO does not evaluate an idea or invention as to patentability (Finding 88), does not evaluate an idea or invention as to marketability (Findings 93, 94, 105, 106), does not prepare models

of ideas or inventions as part of the development contract (Findings 106, 141), does no testing of products, and does not profess to be a coinventor of its clients' ideas or inventions (Schwartz, Tr. 4031; Lee, Tr. 5012–15; Traube, Tr. 5172; CX 1450–51), it is appropriate to conclude that the services RLO renders to a client in respect to the development and technical refinement of an idea or invention is limited to the preparation of sufficiently professional drawings to permit the patent attorney to use them in filing a patent application and to enable RLO to prepare a brochure or prospectus for circulation to industry (RPF, p. 31; Brody, Tr. 3113).

124. The testimony of RLO client, Dr. Albert Giaquinto, revealed that he obtained the following impressions from RLO advertisements:

. . .They would develop your idea from the beginning to the end and that you did not have to be a scientist or engineer, that they had a staff of people that would develop and present your idea to industry. That's what I thought, they would present my idea, which is all I had, an idea.

* * * * * * *

. . .They (RLO) would take the idea, present it to their engineering department, develop it. . . . So I assumed they were going to take it all the way from my idea to a finalized blue-print that an engineer could actually read and make a working model of. (Tr. 4495–96; See also Tr. 4500) [74]

125. Allen D. Guerard, an RLO client, testified that the RLO advertisement in the telephone directory "Yellow Pages" impressed him as a "package deal":

Well, the package deal research, development, marketing, licensing, new inventions and ideas or words to that effect, introduced to industry. (Tr. 3152)

This client thought RLO was the proper party to make a model of his invention (Tr. 3184).

126. Mary Hill, an RLO client, testified:

They said, you know, they will make a search and then a patent and after that they will refine the product. Then they will manufacture it, you know, the whole thing, . . . (Tr. 2121)

127. RLO client Katherine Mullen testified that RLO's advertisements "claimed to do the whole process, to obtain a patent for inventions or what have you" (Tr. 1821), and she was so impressed with RLO's brochures she did not pay much attention to the written contract (Tr. 1887–88).

128. Diane Brody, an RLO client, testified that the impression she gained from RLO was as follows:

From these letters, yes, from these phone calls. I didn't know any other way to go about marketing, developing, getting a patent for my invention. I saw this. This company took care of everything it seemed. I thought, "why not go with that?" (Tr. 3141)

129. The advertisements, brochures and letters make strong representations that RLO performs all the functions necessary to *develop*[8] the idea or invention and make it [75] ready for introduction to industry. The record demonstrates that this term — develop the idea or invention — is not clearly and readily understandable to the ordinary consumer. The total impression which potential clients can and do receive from the advertisements, brochures, letters and contracts prior to the time the agreements are executed is that RLO will do all the work necessary to develop and refine the client's idea or invention so as to make it patentable and marketable to industry. Contrary to this impression, RLO makes only trivial embellishments and does not substantially develop or technically refine its clients' ideas or inventions.

VI. RLO HAS FAILED TO DISCLOSE THAT CLIENTS MAY HAVE TO PAY ADDITIONAL FEES AFTER ENTERING INTO CONTRACTS WITH RLO

130. RLO advertisements and brochures state that RLO will develop and prepare an idea for cash/royalty sales (CX 24); and place the invention in a suitable form for presentation to industry (CX 44J). None of the advertisements or brochures mention the cost of RLO's program. After a client contacts RLO, the client receives the Inventors Information Kit and returns a completed Record of Invention form. The client's next contact is receipt of a letter from RLO along with a Preliminary Product Research Agreement (Findings, 8, 9, 60–61).

131. The letter accompanying the research agreement requests that the client "permit us to have preliminary product research conducted at this time, for the relatively modest sum of $100.00 . . ." (CX 96A). The letter also states that within a few weeks after receiving the results of the research, the client will receive RLO's "recommendation for the development of your invention" (CX 96A). Neither the letter, the Preliminary Product Research Agreement, nor the Account Executive reveals the cost of the recommendations in the form of a development contract which the client will receive at a later date.

[8] Develop means, *inter alia* -
"to set forth or make clear by degrees or in detail; to make available or usable."
Webster's Seventh New Collegiate Dictionary

132. Former Account Executive Paul Duber testified:

A. It was not company policy to disclose any fees beyond that particular program that we were selling. If we were selling a [76] patent search we were not to tell them what the development program was going to cost. There was no disclosure of any type. (Tr. 4233)

133. After the preliminary research is completed, RLO forwards copies of patents located in the Patent Office search to the client along with a letter development contract (Finding 13). The development contract sets forth a flat fee for RLO's services:

* * * * * * *

. . .Since we are Invention Developers, we have assembled a staff and retain, as needed, qualified independent contractors, for carrying out many of the important steps for introducing an invention to industry. Accordingly, we would, in return for an assignment of a twenty percent (20%) minority interest in the invention plus a fee of $775.00 proceed with the immediate development of your invention. . . (CX 100A).

134. The development contract further states:

On behalf of our venture, in which we have a twenty percent (20%) interest and you have an eighty percent (80%) interest, we will, at no additional cost to you, retain a registered patent attorney or agent to prepare an application for patent on this invention. . . . We will pay our proportionate shares of Government fees and, if prosecution of the patent application is agreed upon, we will pay our proportionate shares of those fees or costs upon which we mutually agree (CX 100A, 367). [77]

135. The additional fees which an RLO client may be required to pay, if the client follows through with the RLO program,[9] beyond the fee specifically set forth in the contract, are:

(1) A Patent Office filing fee of $65.00 (Gorman, Tr. 2395–98; Duber, Tr. 4233; Pion, Tr. 6921; CX 1220).

(2) An attorney fee of approximately $75–135 if the patent application is rejected by the patent examiner and the client desires to file an amendment to attempt to overcome the rejection (Guerard, Tr. 3223; Giaquinto, Tr. 4549–50; Kaplan, Tr. 5392; Lean, Tr. 8220; CX 1043, CX 1261A–C, CX 1267, CX 1583A, CX 1804A, CX 2169).

(3) A patent issuance fee of a minimum of $112 if a patent is allowed (35 U.S.C. 151; Lee, Tr. 5020–23).

[9] After a client has signed a development contract and at the time the United States patent application is being prepared, RLO offers the client the Canadian marketing program. There would be additional charges for this program which are not known to the client at the time the United States development program is commenced (Finding 17). There is also a $50 Canadian filing fee if the client accepts the Canadian program (Brody, Tr. 3122–23).

(4) An assignment recordation fee of $20 to record the assignment of RLO's 20% interest in the patent after it issues (RX 53-60).

(5) Charges for preparation of models (Lart, Tr. 2529-30; Brody, Tr. 3120-21; CX 1440A, CX 1447).

[78] RLO would, of course, pay its proportionate share of the additional governmental fees and patent attorney fees based on its 20% ownership (Duber, Tr. 4233).

136. The RLO contracts which clients enter disclose only the flat fees. RLO clients are sometimes told orally about the $65 United States fee for filing the patent application (Gorman, Tr. 2395-98; Duber, Tr. 4233; Bucko, Tr. 4376-78; Giaquinto, Tr. 4522-23; Pion, Tr. 6921; Lean, Tr. 8209-10). However, clients are not told about the fee for filing an amendment to the patent application (Mullen, Tr. 1847; Bellavista, Tr. 2048-49; Hill, Tr. 2123; Brody, Tr. 3123; Duber, Tr. 4233; Giaquinto, Tr. 4549-50; Lean, Tr. 8209-10). One client was charged $25 by the patent attorney for filing a paper to obtain a three-month extension of time within which to file an amendment, and an additional $40 for an office visit with the patent attorney (Bucko, Tr. 4378).

137. Donald R. Dunner, a patent law expert, testified that clients seeking patents on their ideas or inventions should be counseled on the possibility that the initial patent application may be rejected and that further prosecution of the application by way of amendment may be necessary. He testified:

A. Yes, I think it is important to counsel a client as to what will happen down the line after the application is filed. The reason that it is important is that almost invariably applications which are filed in the Patent Office receive a first rejection. When I say "almost invariably," if I had to guess what the percentage would be it must be 80 or 90 percent if not higher than that, resulting not only in the requirement for further work for the filing of further papers, but resulting in the necessity of further expense to the [79] client. As a result of that fact unless the client is forewarned that there is going to probably be additional requirements for work, additional requirements for charges made to the client, the client may well be in for a rude shock at a point when he's already made an investment of a substantial amount of money. So my opinion is that it is necessary for him to be pre-advised before he makes any meaningful investment in the process. (Tr. 3257-58)

138. Patent Attorney, Richard S. Shreve, Jr., a patent attorney at one time retained by RLO for prosecution of its clients' patent applications, testified that all RLO applications were rejected at one point "which is always the case" (Tr. 2840, 2871).

139. Jere Sears, Deputy Solicitor of the Patent Office, testified

that the inventor should be briefed on the possibility of an initial rejection of the patent by the patent examiner (Tr. 1083).

140. Patent Office procedure dictates that an initial rejection of a patent application is a routine occurance (Findings 137–138). Patent attorneys engaged by RLO to prosecute patent applications always charged an additional fee for preparation of amendments to patent applications, and that fact was well known to RLO (Finding 135). Further, RLO does not advise its clients of the likelihood of an initial rejection of the patent application necessitating the filing of an amendment and of the additional fee which will be charged the client for this service (Findings 130–134).

141. RLO does not advise clients prior to signing the development contract that a patent issuance fee and a patent assignment fee will be required if the client succeeds in obtaining a patent. Likewise, clients are not advised that there will be additional charges if the client desires a model of his invention to be made. [80]

VII. RESPONDENTS LEE AND RLO HAVE FAILED TO DISCLOSE THAT THEY ARE NOT REGISTERED PATENT ATTORNEYS OR PATENT AGENTS AND ARE NOT QUALIFIED OR RECOGNIZED TO FILE OR PROSECUTE PATENT APPLICATIONS BEFORE THE UNITED STATES PATENT OFFICE

142. Many advertisements and brochures disseminated by RLO detail the educational and professional background of Raymond Lee. For example, CX 2604K, a stapled-on addendum to the typical Inventors Information Kit, contains the statement "NO ORGANIZATION IS ANY BETTER THAN ITS LEADERSHIP" and lists the professional background of RLO's founder, Mr. Raymond Lee, as follows:

> Founded by Raymond Lee, B.S., I.E.; J.D. (LL.B) former: U.S. Patent Office Examiner, U.S. Dept. of Army Patent Advisor, U.S. Registered Patent Attorney, Canadian Registered Patent Agent, Advisor to the TV series "The Big Idea." (See also CX 60D)

143. Other RLO brochures state:

> The Founder-President of the Company, Raymond Lee, has degrees in Industrial Engineering and Law, and has had extensive experience with inventions and new products. He is a former: United States Registered Patent Attorney, Canadian Patent Agent, United States Patent Office Examiner and United States Department of Army Patent Adviser. (CX 44D, 45D, 46D)

144. RLO's Inventors Information Kit contains the reprint of an article from *Home Craftsman* magazine which features the photograph of Lee and this information: [81]

Raymond Lee served as Patent Examiner in the United States Patent Office from 1949 to 1953.

He was then appointed United States Government Patent Advisor for the Pitman-Dunn Laboratories of the Frankfort Arsenal in Philadelphia, where many inventions were developed in which the United States Government had an interest. For approximately eight years following his resignation as U.S. Government Patent Advisor, he practiced in Philadelphia as a registered patent attorney . . .

Now, he is an Invention Developer, whose services are sought by inventors, lawyers and manufacturers throughout the United States and in foreign countries. (CX 53B, 2604)

The front page of this reprint states:

This is a reprint of an article prepared for Home Craftsman Magazine by Raymond Lee, formerly a Registered Patent Attorney, U.S. Patent Office Patent Examiner and U.S. Government Patent Advisor, who is now an Invention Developer assisting inventors, manufacturers and attorneys throughout the world. (CX 53A)

145. Representations about individual respondent Lee's professional qualifications in the patent and legal field are sprinkled throughout the Inventors Information Kit and have been contained in RLO's advertising literature for many years (Peska, Tr. 7148–49; CX 2, 3, 40, 49, 53–55, 60, 68). Such statements could reasonably be understood by potential clients to impliedly represent that Raymond Lee is currently a private, as compared to government, patent attorney or agent and is qualified to file and prosecute patent applications on behalf of RLO clients. [82]

146. Implied representations of RLO's high qualifications in handling patent matters also appear throughout RLO's promotional literature. CX 68 and 2604C, RLO's brochure entitled "THE INVENTION GAME," contains an article entitled "TALE OF THE TWIST-OFF A PRODUCT SUCCESS STORY," which tells how former Philadelphia patent attorney, Raymond Lee, helped the inventor of the "Twist-Off" bottle cap after his patent had expired. The article states:

An unexpected side story also developed. . . . Raymond Lee responded to the need for a complete service to protect and promote the interests of the small independent inventor. He resigned his Patent Office and Bar affiliations and left behind a flourishing practice narrowly restricted to patent and trademark law to establish an organization offering assistance in all phases of invention development and marketing. (CX 68C)

147. The promotional brochure entitle "THE CLIENT AND THE RAYMOND LEE ORGANIZATION" repeatedly emphasizes the high qualifications and expertise attributed to RLO's staff with statements such as:

Our Product Research Department will act as your Intelligence Agency . . . [to]. . . probe and study . . . the related records of the United States Patent Office. They search prior U.S. patents . . .They wind their way through Patent Office records and corridors often talking to Patent Office Examiners. . .

Each person in our Product Research Department . . . is a specialist in his field, in [83] some cases having been an Official Examiner in the U.S. Patent Office where he received his "basic training." (CX 44I, 45J, 46I, 2604H)

* * * * * * *

The Company has facilities for assisting in the establishment of "International Rights of Priority"[10] for any invention in which it owns an interest." (CX 44"O", 45"O"; see also CX 44C, E, G-H, 45C, E, G-H, 46C, E, G-H, 50).

148. Although a few brochures refer to RLO retaining, as needed, independent contractors for establishing "International Rights of Priority" or retaining, on behalf of the joint venture (RLO and its client), the services of a registered patent attorney or agent to establish "patent pending" status (CX 46"O", 49D, 2604H), such statements do not preclude an understanding on the part of potential clients of RLO that the corporation is qualified to prepare, file and prosecute patent applications.

149. Representations of respondents qualifications and experience made in RLO promotional literature have, in fact, been understood by some RLO clients to mean that respondents could prepare, file and prosecute applications on their behalf before the Patent Office (Mullen, Tr. 1821, 1842, 1873-74; Gorman, Tr. 2374-75, 2424-25; Sarno, Tr. 5342). Mr. Peska, RLO's former Vice President, testified that in his face-to-face dealings with clients he never affirmatively disclosed the fact that Lee was not a patent attorney and was precluded from filing patent applications with the Patent Office (Peska, Tr. 7297-99). [84]

150. The first contract which RLO offers a potential client, the Preliminary Product Research Agreement, is for the purpose of providing the client with patents which may be located by RLO in a search of Patent Office records. Thereafter, RLO sends the client copies of patents which were located in the search. Prior to execution of the development contract, RLO has handled all patent aspects of the idea or invention. The client is not informed of the name of the patent agent retained by RLO until the patent application has been

[10] This term as used by respondents apparently refers to those rights extended to inventors under 35 USC 119 which gives, under certain circumstances, a patent application filed in a country which has entered a treaty providing for reciprocal treatment the benefit of the earlier filing date on a patent application filed in another signatory country. RLO's promotional literatures references to "facilities for assisting in the establishment of International Rights of Priority" may, therefore, be read to represent that RLO can assist in filing U.S. or foreign patent applications since such filing must be accomplished in order to establish these rights. An uninformed person may make any or all of these assumptions in this highly technical area.

prepared. This course of dealing impliedly represented to clients that RLO is qualified to prepare and file patent applications.

151. In order to give an opinion as to patentability, a person must be an attorney admitted to the practice of law in some jurisdiction, or a patent agent registered to practice before the Patent Office (Dunner, Tr. 3241, 3249–50; Sears, Tr. 1066–67, 1114). All lawyers and patent agents who represent clients in patent matters before the Patent Office are required to be registered with the Patent Office (Sears, Tr. 1066–67). A patent agent is an individual registered with the Patent Office who is not an attorney (Sears, Tr. 1067). An individual can become a registered patent attorney by being a member of a bar and taking an examination given by the Civil Service Commission, or by serving as a Patent Examiner for a four-year period (Sears, Tr. 1067). A corporation as such may not render a patentability opinion (Dunner, Tr. 3250).

152. Respondents admit that Mr. Lee is not now a registered patent attorney or agent and is not now permitted by law to render a patentability opinion and that respondents are not qualified or recognized by the Patent Office to prepare, file or prosecute applications before such office (Lee and RLO's Ans., ¶¶2,6; Lee, Tr. 495–96). [85]

153. The promotional materials disseminated by RLO and its course of dealing has the capacity to mislead potential clients as to the present status of Lee and RLO. Having created the potential for deception, respondents had an affirmative duty, which they failed to meet, to affirmatively disclose to potential clients that Lee and RLO were not registered patent attorneys or agents and were not qualified to prepare, file or prosecute patent applications before the Patent Office.

VIII. COMPLAINT COUNSEL FAILED TO MEET ITS BURDEN OF PROOF AS TO UNNECESSARY DELAY ON THE PART OF RLO IN OBTAINING PATENT PROTECTION FOR CLIENTS

154. The first contractual agreement between RLO and its clients is a Preliminary Product Research Agreement. This agreement provides a time frame for completion of the work contemplated in the agreement as follows:

> Approximately eight weeks is to be allowed for completion of this matter. (CX 3101)

155. The development contract contains no time schedule for completion of the services to be performed by RLO pursuant to that

contract. It does represent that RLO will "proceed with the immediate development" of the invention, and that after patent pending status is established, a sales letter and prospectus will be prepared. RLO makes a further representation that it will "proceed immediately" upon receipt of the development contract to have the invention "processed at an early date," and the contract emphasizes that time is an extremely important factor and important rights are sometimes lost because of unnecessary delay (CX 1846). Other than the above general statements in the development contract, clients are given no dates by which patent protection will be established (Dicks, Tr. 971–72).

156. Complaint allegations concerning delay are limited to unnecessary delay in obtaining patent protection for clients. The complaint does not specify [86] whether the "patent protection" contemplated is patent pending status or the obtaining of an actual patent. Further, it does not appear that the failure to eventually obtain a patent is contemplated by complaint counsel as "unnecessary delay." Complaint counsel's proposed findings relating to delay concentrate on that delay between the execution of the development contract and the time the patent application is filed in the Patent Office, although complaint counsel apparently does not seek to prove "unnecessary delay" by establishing delay after the clients' idea has been presented to the patent attorney retained by RLO (CCPF, pp. 673–86).

157. RLO permits clients to pay its charges for services in installments (Dicks, Tr. 907–08; Duber, Tr. 4262; CX 771–772). RLO also has a general policy that the patent application will not be filed until payment in full has been made by a client (Dicks, Tr. 907–08, 967–68; Coyle, Tr. 1516, 1552; Salemi, Tr. 2461; Glass, Tr. 3868; Duber, Tr. 4235–36; Bucko, Tr. 4361–63; Giaquinto, Tr. 4512, 4520–21; Peska, Tr. 4873; CX 771–772, 1795–1796). RLO clients are not advised of this policy at any time prior to execution of the development contract.

158. The record establishes that there has been substantial delay in a number of instances (Coyle, Tr. 1552; Switkin, Tr. 1791–93; Hill, Tr. 2158; Segasture, Tr. 2293–94; Duber Tr. 4231–32; Giaquinto, Tr. 4512, 4520–1; Bucko, Tr. 4369–72; Traube, Tr. 5173; CX 1022, 1032, 1853–1854, 1858, 1870, 1871–1872). Some of this delay is due to clients making payments in installments (Coyle, Tr. 1552; Duber, Tr. 4234–36).

159. The give and take obviously inherent in the process of embodying the clients' ideas in drawings that will be filed in the

Patent Office account for some passage of time (Gorman, Tr. 2423; CX 42).

160. Complaint counsel has not separated out the necessary from the unnecessary delay. Thus, complaint counsel has not met the burden of establishing that unnecessary delay occurred in a significant number of instances, both terms being relative and subjective. More importantly, there is no evidence of any patent protection being lost, forfeited or diluted because of any alleged delay. [87]

IX. RLO FAILED TO DISCLOSE MATERIAL FACTS RESPECTING CLIENTS' ASSIGNMENT OF AN INTEREST IN THEIR IDEAS OR INVENTIONS TO RLO

161. RLO's development contracts with its clients provide that the client assigns to RLO an interest in the invention, and in any patent rights that may be applied for or granted on the invention. The interest usually assigned to RLO is twenty percent (20%) (CX 100). RLO's interest in its clients' patents is routinely recorded in the Patent Office whenever a patent is issued to one of its clients (RX 53–60).

162. 35 U.S.C. 262 provides as follows:

In the absence of any agreement to the contrary, each of the joint owners of a patent may make, use or sell the patented invention without the consent of and without accounting to the other owners.

163. Jere W. Sears, Deputy Solicitor of the United States Patent and Trademark Office, testified regarding Section 262 of the United States Patent Laws, as follows:

Q. Mr. Sears, can you explain for the Court the import and meaning of Section 262 of the United States Patent Law referring to the assignment of an interest in a patent to a joint owner?

A. Yes. Oddly enough, a joint owner of a patent may exploit the patent without making any account or reckoning to the other joint owner. . .

* * * * * * *

JUDGE BARNES: Mr. Sears, the two joint owners would have an action, I guess, at law, as to accountability? [88]

THE WITNESS: Not under the patent statute. It would require a collateral agreement. (Tr. 1100–31)

164. Donald R. Dunner, a patent law expert, testified similarly regarding the effect of Section 262:

. . .one aspect of an assignment of an interest in an invention is that the joint owners of an invention and of rights in that invention which would include patent rights, need not have the consent of one another in order to make use or sell the invention to others. And, in fact, as the courts have interpreted, the provision in question in the patent statutes, they do not need the consent of, nor do they have to account to the others as a result of the licensing of the invention or sale of an interest in the invention unless they have entered into an agreement. That is one critical aspect of the consequences of an assignment. (Tr. 3251)

Mr. Dunner further testified that a client should be advised as to the legal import and meaning of his making of an assignment of an interest in his invention:

. . .[T]he client should be advised and he should be advised by whoever is advising him, whether that person is a patent attorney, patent agent or otherwise. And the reason he should be advised is that unless he is so advised he runs the risk that one of his joint owners can effectively nullify his interest in the subject matter of the invention by either [89] licensing it to others without accounting to the inventor, by assigning an interest to others without accounting to the inventor or by doing anything to the subject matter without accounting to the inventor. And the end result of that is that if $10 million were made on the invention as a result of the activities of the joint inventor, those $10 million could conceivably not come to the original inventor even to the extent of a penny unless they have a prior agreement.

JUDGE BARNES: Even if the inventor brought a court suit for an accounting?

THE WITNESS: Yes. Because Section 262 of Title 35 makes it clear there is no accounting without a prior agreement. (Tr. 3255)

165. RLO accurately contends that there is no evidence RLO ever attempted to make, use or sell the patented invention of a client without the consent of and without accounting to the other owner (RPF, p. 44). The record is clear, however, that RLO does not counsel potential clients as to the significance of 35 U.S.C. 262 in respect to the assignment of an interest in an invention. One Account Executive testified that he did not know what that section of the patent laws means (Coyle, Tr. 1532; see also Peckham, Tr. 7035, 7072). Clients testified that they received no counseling by RLO in respect to the significance of 35 U.S.C. 262 (Mullen, Tr. 1853-54; Kaplan, Tr. 5384; Vigliotti, Tr. 5415; Coburn, Tr. 5497; Friedman, Tr. 5564; Lean, Tr. 8199-8200). RLO clients do not have any communication in any respect with a patent attorney or patent agent until after the development contract has been executed and the assignment of an interest in the invention to RLO (Dicks, Tr. 883-94; Lean, Tr. 8202). [90]

166. The assignment of an interest in a patented invention is a very critical undertaking, and the legal consequences of such an assignment are material facts which should be disclosed to the

inventor prior to any assignment (Dunner, Tr. 3255). This RLO has not done.

167. RLO further contends that a co-owner may deal with a patent as a full owner only "in the absence of any agreement to the contrary" (35 U.S.C. 262), and that the very vehicle of the assignment — the development contract — is an agreement to the contrary within the meaning of the statute since it provides RLO will do nothing with respect to the clients' invention without the clients' approval (RPF, p.44). The language of the development contract relied upon by RLO as "an agreement to the contrary" is as follows:

> We shall actively negotiate with manufacturers expressing an interest in acquiring rights to this invention. While we cannot give assurances that our participation will result in financial success, you will be kept informed of our progress and the acceptance or rejection of any offer will be entirely up to you. (CX 100B, 744, 1250, 1832, 1986, 3077)

168. While the RLO development contract argueably might offer some protection to the client, whether the language of the contract is an "agreement to the contrary" within the meaning of Section 262 has never been litigated in the courts. In light of the specific language of 35 U.S.C. 262, a specific contractual agreement between RLO and the client would obviously be more appropriate than the questionable and non-specific language of the development contract which is routinely signed by RLO clients. [91]

X. RLO'S UNAUTHORIZED USE OF THE NAMES, PHOTOGRAPHS AND QUOTATIONS OF PUBLIC FIGURES IN ITS PROMOTIONAL LITERATURE

169. Many of the promotional brochures distributed to potential clients by the RLO contained the names, photographs and quotations of prominent public officials impliedly endorsing or recommending RLO or its services (CX 47, 61D, 1789B, 2144, 2179A, 2181A, 2192A). The quotations set forth in such brochures were excised from routine responses written by such officials after receiving a letter from RLO advising them of the services RLO provides which might be of assistance to their constituents (Peska, Tr. 4798–99; Bartlett, Tr. 303–04; Randolph, Tr. 196–98, 211). The photographs reproduced in conjunction with such quotes were obtained by requesting photographs from the respective officials' office without disclosing the intended commercial use to which such photographs would be put (Peska, Tr. 7167).

170. The front page of one RLO brochure utilizing photographs and quotations of public officials, CX 47, states:

For many years, The Raymond Lee Organization has enjoyed the respect and esteem of the business community.

We are proud of our reputation and hope you will soon join our long list of satisfied clients.

The last page of this brochure is entitled "A FEW WORDS FROM SOME PROMINENT NATIONAL LEADERS" and sets forth photographs and quotations of former Senator Peter H. Dominick of Colorado, former Congresswoman Julia Butler Hansen of Washington, United States Senator Jennings Randolph of West Virginia and former Governor [now Senator] Dewey Bartlett of Oklahoma. (See also, CX 2170A, 2192A). A variation of this brochure, CX 1789B, substitutes photographs and quotations of Congressman William B. Widnall of New Jersey and former Congressman Alphonzo Bell of California for former Senator Dominick and former Governor Bartlett, but in all other respects is identical to CX 47. [92]

171. Another RLO brochure entitled "Words Of Praise From Some Of Our Clients" also reproduces on the back page "A FEW WORDS FROM SOME PROMINENT NATIONAL LEADERS" (CX 61D, 2144D, 2204B–E). Public figures whose photographs and quotations are used in this brochure include United States Senator Hubert H. Humphrey of Minnesota, former Governor Kenneth M. Curtis of Maine and former United States Senator John V. Tunney of California, and former Congresswoman Julia Butler Hansen. The brochure also contains a photograph and letter praising RLO from Judge Roy H. Adams, Bandera County, Texas.

172. RLO also distributed to some potential clients a brochure entitled "WESTERN UNITED STATES Does Its Part to SET THE PACE For PROGRESS" (CX 73, 2181). An inner page of this brochure reproduces in its entirety a letter to Mr. Peska of RLO from former Congressman Alphonzo Bell written on Congressional letterhead and from which the date has been deleted. A photograph of Congressman Bell is also reproduced with the letter (CX 73D, 2181A and E).

173. Senator Randolph, former Congressman Bell and Senator Bartlett testified in this proceeding that they had never endorsed RLO, were unfamiliar with RLO services and had never granted permission to RLO to use their photographs, titles or quotations from their routine correspondence in RLO promotional literature (Randolph, Tr. 185–86, 188–89, 212, 231; Bell, Tr. 242, 245–46; Bartlett, Tr. 293, 295–96, 304–05). Permission to use their photographs, titles and quotations had never been requested and they unanimously objected to such use (Randolph, Tr. 188–89; Bell, 246–47, 250–51, 262, 290; Bartlett, Tr. 295–96, 306–07, 310). In addition to this testimony,

correspondence to RLO from these witnesses, as well as such correspondence from Senator Humphrey and former Senators Dominick and Tunney, objecting to RLO's unauthorized commercial use of their photographs, titles and letter quotations was received in evidence (CX 2183, 2185, 2193, 2204A, 2217A–B, 2225).

174. Routine correspondence from Mr. Friday, former Deputy Commissioner of the New York Department of Commerce, and Mr. Risch, former Director of the New York Office of the State Department of Commerce, written in 1967 on State of New York Department of [93] Commerce letterhead was also reproduced in some RLO promotional brochures distributed to potential clients (CX 60B, 2195, 2196, 2199D, 2604D). Use of Mr. Friday's letter in RLO's brochures helped to create, or reinforce, the erroneous impression that RLO had received such recommendation or endorsement from Mr. Friday and/or the State Department of Commerce. Mr. Friday, in 1967, advised Raymond Lee that some individuals were under the impression that RLO had been recommended by the New York State Department of Commerce and requested that reference to himself or the Department in all future dealings with RLO clients cease (Friday, Tr. 1486, 1490–91; CX 2198).

175. Promotional brochures sent to potential RLO clients in the Inventors Information Kit also contained photographs of the former Mayor of New York City, John V. Lindsay, awarding a "Declaration of Commendation" to Mr. Raymond Lee and reproduced a facsimile of this commendation. Richard Lewishon, former Finance Administrator of New York City, also appears in the "Commendation" photographs (CX 58E–F, 59B–C, 60B–C, 80B, 1078E, 1206B&D, 2142B–C, 2199E–F, 2200B–C, 2796A–D, 3069A–D; RX 12). Many of the brochures containing former Mayor Lindsay's photograph state in bold type on the cover page that RLO is "INTERNATIONALLY KNOWN BY GOVERNMENT COMMERCE & INDUSTRY FOR ITS SUPPORT LEADERSHIP & INTEGRITY" (CX 1242A–D, 2142A–D, 2796A–D).

176. The "Declaration of Commendation" was devised by the City of New York Administration to show its appreciation to individuals and organizations doing business in New York City for their participation in a program offering assistance to small businesses in the city via the Executive Volunteers Corps and to publicize this program (Watt, Tr. 532, 610–11, 657; Lindsay, Tr. 987–88, 998). Mr. Peska testified that he and Mr. Lee received such commendations for their personal assistance to individuals in developing and marketing their inventions and ideas (Peska, Tr. 4802). [94]

177. Although the use to which a "Declaration of Commendation" was put was never monitored (Watt, Tr. 641), neither Mayor

Lindsay nor the New York City Department of Commerce had intended to endorse the recipients of these awards (Watt, Tr. 640; Lindsay, Tr. 985–86). Permission of former Mayor Lindsay had never been requested to use his photograph in RLO's brochures nor had such permission been granted (Lindsay, Tr. 986, 990–91; Peska, Tr. 4806).

178. Promotional brochures sent to prospective RLO clients also contained a photograph of an RLO client, Mr. Hatch, shaking hands with President John F. Kennedy (CX 60C, 2604D). This photograph was forwarded to RLO by Mr. Hatch for use in its advertising programs, but is apparently unrelated to any relationship between RLO and Mr. Hatch and impliedly misrepresents an endorsement or relationship between RLO's activities and President Kennedy (CX 60C, 2604D).

179. RLO's position with regard to their unauthorized use of public officials' photographs, titles, and letter excerpts in their promotional literature has consistently been that "[t]he First Amendment protects RLO's accurate statements and portrayals, whether consented to or not" and that if any cause of action arises from such unauthorized use it is solely a private right (RRP, pp. 32–33, 49–50). When, in October 1973, Senator Randolph objected to the use of his name, title and letter excerpt in RLO's promotional literature, he was advised by RLO's counsel, Samuel N. Greenspon, that:

> . . .when you wrote the letter [used in the brochure] to The Raymond Lee Organization, Inc. it [RLO] became the owner of that letter and was certainly entitled to use the same so long as it did not misquote you. (CX 2218A)

180. The record also discloses that when requests were received from public officials to discontinue the unauthorized commercial use of their photographs and letters in RLO promotional literature, RLO did not promptly comply with such requests (*Contra,* Peska, Tr. 7167). [95] For example, former Congressman Bell initially requested removal of his letter excerpts and photograph from RLO's brochures in April of 1971 (CX 2183). In March of 1973, upon learning of RLO's continued unauthorized use, he again objected to such use "in the face of written instructions that you discontinue this unauthorized practice" (CX 2185; see CX 2184, 2218).

181. RLO asserts that use of public officials' letters and photographs in their promotional literature was not intended to constitute an endorsement of RLO by the cited official nor could the letter excerpts be construed as an endorsement (CX 2218B; Peska, Tr. 4866; Julien, Tr. 8111; RPF, pp. 49–50, 52). While denying any intent to

imply endorsement by the public officials cited, RLO has advanced no other commercial reason for inclusion of these photographs and letter quotations in its promotional literature.

182. Contrary to RLO's statement that ". . . there is no evidence that anyone thought or even could think that the presence of such material [use of public officials' names, titles, photographs and letters] was or could be construed as an endorsement of . . . such individuals of RLO's services" (RPF, pp. 49–50; CX 2218B), public officials themselves recognized the capacity to mislead inherent in such practice. Senator Randolph's letter to RLO objecting to this practice states:

> . . .The fact that my reply to a 1967 letter offering assistance has been misrepresented by you as my 'endorsement' of your enterprise has apparently led several West Virginians to engage your services. (CX 2217A)

(See also CX 2225, Senator Tunney's letter to RLO) Former Congressman Bell also recognized the capacity to mislead inherent in RLO's practice when he testified that, although nothing in the brochure states he endorsed RLO, ". . . the use of the picture and the use of the letter that way in the brochure might imply that I am actively supporting their operation" (Tr. 288). [96]

183. Clients of RLO testified that they were favorably impressed by the photographs of public officials contained in RLO's promotional brochures whether or not they perceived this material to be an actual endorsement or recommendation (Salemi, Tr. 2444–46; Brody, Tr. 3086–87; Bucko, Tr. 4358; Kaplan, Tr. 5401; Coburn, Tr. 5524–55; Bowers, Tr. 4701–02).

184. A review of the promotional brochures received in evidence containing the names, photographs and quotations of prominent public officials demonstrates the inherent capacity of this material to mislead potential RLO clients into the belief that such individuals endorsed or recommended the RLO organization and its services (CX 47, 61D, 1789, 2144, 2179A, 2181A, 2192A).

XI. RLO'S SERVICES WERE AND ARE OF LITTLE OR NO VALUE TO ITS CLIENTS

185. Paragraphs Twenty One and Twenty Two of the complaint allege that respondents' unfair or deceptive acts or practices have induced persons to pay over to respondents substantial sums of money for services of little or no value, and respondents have failed or refused to refund such sums. The retention of such sums of money is alleged to be a continuing unfair act or practice. These allegations of the complaint require a summarization of the representations

respondents have made to clients, an analysis of the services actually rendered clients, and an evaluation of the value of such services to clients.

A. RLO's Representations to Potential Clients

186. RLO's advertisements represent that an inventor's idea or invention will be "developed and prepared" (CX 3), and "we will develop your idea, introduce it to industry, negotiate for cash sale or royalty licensing" (CX 20, 22, 26, 30, 33). RLO brochures which the potential client usually receives in the mail represent that the inventor's idea or invention will be evaluated by a highly knowledgeable, competent, efficient and experienced organization, operating on an international level which is held in high esteem by prominent public officials and by clients and corporations for its integrity and service, and [97] which has broad access to major corporations actively seeking new products through RLO (Findings 30–35, 38, 44–53, 60–62). Advertisements and brochures disseminated by RLO also cite atypical earnings of past RLO clients (CX 30, 32, 64, 67–68, 2593).

187. If a potential client's idea or invention is *accepted,* RLO represents it will present an individualized proposal to the potential client (see Findings 32,41,42,59–61, 65). An Inventors Information Kit brochure, CX 49, states an inventor "may need a specialist to tell you what your proposed product's chances are in the competitive marketplace." RLO will "study your idea" and "suggest a procedure for commencing its development and commercialization." An RLO brochure, CX 44, states that RLO's experience helps it "select new products" of interest to progressive companies. The Record of Invention form authorizes RLO to examine the idea or invention "for the purpose of receiving its comments and suggestions for the international development and introduction of this invention to industry" (CX 52). After review of the Record of Invention form, RLO will submit to the client "a suggested procedure for development of your invention" (CX 50). The Record of Invention form will enable RLO to examine the invention, "explain how we would like to proceed" and "if we cannot accept your invention or idea, we will promptly inform you of our reason" (CX 51).

188. The letter sent to the client with RLO's Preliminary Product Research Agreement states RLO has "completed our examination of it" [the Record of Invention form] and "we would like to suggest" preliminary product research. RLO represents that within a few weeks thereafter the client will receive "the confidential results of our findings" and "our recommendation for the development of your invention, and arrangements on which we would accept a participat-

ing interest in this program. You should, therefore, have this investigation made at once" (CX 96).

189. The development contract in the form of a personalized letter constitutes a recommendation by RLO that the client should proceed with the program outlined in the letter contract (Finding 65). As a former Account Executive indicated, RLO's development [98] proposal represents to the potential client that his idea or invention is something RLO thinks it can sell; otherwise, the proposal would not have been sent out to the potential client (Findings 67–68).

190. Telephone calls from Account Executives encouraged potential clients to enter into research and development contracts. Testimony by Account Executives clearly indicate that these contacts with potential clients created the impression the idea or invention being considered had a good likelihood of making money for the client and for RLO (Findings 53–55). There was "always inferences of a hint of a mint. Otherwise we would never be able to sell the program" (Duber, Tr. 4293). "You have to tell them there is an opportunity. They are not going to pay $1,500" (Coyle, Tr. 1617).

191. The fact that RLO, represented to be a highly respected organization experienced in the international development of inventions, is willing to take a twenty percent (20%) interest in a client's idea or invention creates the impression that the client's idea or invention has a good opportunity for success — "Well, gee, this big company would really take a 20 percent interest in my little invention" (Brody, Tr. 3100). This procedure by which RLO takes an interest in a client's idea or invention is utilized as a sales feature by Account Executives (Findings 67,81–83). Further, the statement in the development contract which permits the client to repurchase RLO's interest within six (6) months for $1,000 indicates to the client the idea or invention has substantial monetary value (CX 100; Finding 14).

192. The compensation of Account Executives under which a substantial portion of their income is based on commissions on sales, and RLO's method of doing business, relying for income solely on the sale of services and not on the successful marketing of inventions, makes RLO's operations conducive to pressure sales tactics and exaggeration of clients' chances for success. [99]

193. RLO's advertisements, brochures, letters, contracts, method of doing business, and the oral representations made by RLO employees, convey the definite impression to potential clients that the ideas or inventions accepted by RLO for "development" and "introduction to industry" are feasible and marketable and that there is a reasonably good chance that the inventor will be

successful. This is the *total picture* presented to potential clients prior to the time the client signs the RLO development contract (Findings 44–58).

B. Value of RLO's Services

194. The most direct and meaningful evidence of the value of RLO's services to its clients is the amount of money earned by clients through the licensing of ideas or inventions handled by RLO. The record is clear in this respect.[11] RLO has negotiated only eight (8) licenses for its clients during the period 1968 through 1976; four (4) of these licenses were for one invention (Lee, Tr. 5119; CX 3937). In 1976 RLO advised potential clients in the State of California, pursuant to a state statute, that only three (3) out of thirty thousand (30,000) clients of RLO had earned more money from their inventions than they had paid to RLO in fees (CX 2600).

195. RLO contends that there are an "unknown and untold number of successful arrangements entered into. . .by RLO clients without RLO's knowledge" (RPF, p. 35). Support for this contention is based on general testimony of RLO officials. There is no other record support of any kind for this broad claim. RLO takes an interest in the inventions of all its clients (Wood, Tr. 6744). It is unrealistic to assume that any significant number of clients have successfully licensed inventions partially owned by RLO without RLO having some knowledge of this fact and participating in the rewards. Beyond the fact [100] that RLO has been unsuccessful in licensing inventions which indicates its total services are of little or no value to its clients, the individual services rendered by RLO are of little or no value to clients.

1. *Preliminary Product Research*

196. The preliminary product research conducted by RLO consists of retaining an independent contractor to conduct a search of the Patent Office files. The researcher is paid from $5 to $8 per search, plus costs for copies, postage and photocopying (Finding 11; CX 2601S). Donald R. Dunner, a patent law expert, testified that the usual patent search requires a minimum time of four to five hours (Tr. 3276–77).

197. Complaint counsel did not call as a witness any patent researcher employed by RLO, and no evidence was introduced to

[11] Respondents contended during the trial that some clients were motivated not necessarily by money, but by matters of pride in obtaining a patent or in solving a problem; however, it is manifest that the primary and overriding consideration of RLO clients was the desire to make money (Dunner, Tr. 3269; Goldscheider, Tr. 5238; Udell, Tr. 8426).

establish the contractual obligations undertaken by a researcher retained by RLO. The record establishes that a patentability search is "essential" prior to filing a patent application (Dunner, Tr. 3277). It would appear that an adequate four or five hour patent search is not likely to be accomplished for $5 to $8. Moreover, there is substantial evidence that the Patent Office search conducted on behalf of RLO is inadequate. Several witnesses in this proceeding testified that there were usually only five or six, or less patents located in the patent search (Coyle, Tr. 1514, 1602, 1605; Winter, Tr. 1710; Switkin, Tr. 1782; Gorman, Tr. 2375–77; Salemi, Tr. 2451; Lart, Tr. 4504; Lean, Tr. 8193–94). Richard S. Shreve, a patent attorney employed by RLO, testified that the patent searches he saw were poor (Tr. 2871–72). In fact, the Preliminary Product Research Agreement does not promise a patentability search, it is called preliminary product research to give the client "the benefit of a comparison with other developments which have taken place in this field" and to "provide valuable information about some of the inventions which have already been developed in this field" (CX 96).

198. After the preliminary product research results are returned to RLO, such results are either mailed to the client or shown to the client for the client's evaluation — "this research [is] for the [101] purpose of providing [the client] with the benefit of personally comparing and evaluating" the client's idea or invention "with respect to such related U.S. patented inventions as may be located through such research" (CX 96). The patents are spread out in front of the client without any explanation (Bucko, Tr. 4366). Mr. Dunner, the patent law expert, testified that sending patent copies to a layman was "irrelevant"; uninformed persons are incapable of making informed judgements about patentability (Tr. 3247).

199. The record is clear that RLO does not furnish the client with a patentability report or evaluation and the patent attorney retained by RLO does not furnish a patentability report (Findings 86–91). Further, the client receives no face-to-face consultation from the patent attorney retained by RLO. The first time an RLO client even knows the name of the patent attorney is when the client receives *from RLO* the patent application which is to be signed by the client and *returned to RLO* (Dicks, Tr. 885–90; Coyle, Tr. 1552–53; Duber, Tr. 4221; Bucko, Tr. 4356; Peska, Tr. 7600; Lean, Tr. 8202–03). Mr. Sears, a Patent Office official, testified that clients are best served by having a face-to-face interview with the patent attorney (Tr. 1197; see also, Dunner, Tr. 3283). He further testified that the inventor "to be served in a proper manner," should receive an appraisal of patentability from counsel (Tr. 1090). Mr. Dunner, a patent law

expert, testified that he always gives clients a patentability opinion, usually a written opinion (Tr. 3281, 3314). Thus, RLO clients do not receive an adequate preliminary patent search, do not receive a patentability report, and do not have personal consultation with the patent attorney.

2. *Patents*

200. Complaint counsel contends RLO's record in obtaining patents for its clients is far below the national average (CPF, pp. 667–672). The overall percentage of patent applications allowed to issue by the Patent Office as patents is approximately sixty-six percent (66%) (CX 3002, p. 7). [102]

201. Complaint counsel contend that RLO has filed at least 3,000 patent applications since 1967, but that RLO has recorded only 590 assignments of patents since 1968 (about 20% issuance rate) (CX 2000). Complaint counsel further point out that in 1974 RLO clients obtained 217 patents whereas 1,498 clients entered into development contracts (about 14.5% issuance rate) (CX 2601); in 1975, 271 patents were issued to RLO clients whereas 1,585 clients entered into development contracts (about 17% issuance rate) (CX 2601D–E). RLO contends more than 700 patents were issued to its clients since 1972 (RRF, p. 75). There is no clear figure of the number of patent applications filed in any one year and a corresponding figure showing the resulting patents issued from those specific applications. Likewise, the number of clients that declined to make payments called for in the development contract or declined to proceed with their patent application because of the additional fees that were required is not known. Therefore, the correct statistics of patents issued compared to patent applications filed cannot be conclusively resolved on this record; however, such a determination is not necessary.

202. The mere fact a patent issues is of little value to an RLO client. The record establishes that many patents that issue are commercially worthless, particularly because the subject matter covered by the patent specifications or claims is too narrow to provide any significant commercial protection (Sherman, Tr. 693, 719; Dunner, Tr. 3246; Lang, Tr. 3400–01; Yates, Tr. 4621; Cx 3096). The fact that patent pending status has been obtained for clients and the fact that actual patents have issued have had no appreciable effect on RLO's success in obtaining monetary benefits for its clients. Therefore, the number of patents issued to RLO clients contributes little to the measure of value of RLO's services to its clients.

3. *Marketing*

203. RLO does not give its clients' ideas or inventions any evaluation as to marketability (Findings 92–107). Mr. Shreve, a patent attorney retained by RLO, testified that as to his *own* [non-RLO] clients, [103] he will never file a patent application unless it can be shown there is a market for the invention (Tr. 2872). Mr. Dunner testified that he "absolutely and always" counsels his small, unsophisticated clients about marketability and the small chance they have of ever making money on their invention (Tr. 3260–61).

204. Dr. Gerald G. Udell, Associate Professor of Marketing and Director of the Experimental Center for the Advancement of Inventions and Innovations at the University of Oregon ("Innovation Center"), testified that the traditional inventor lacks the necessary expertise to make a marketability evaluation of his idea or invention (Tr. 8359–60).

205. RLO rejects only a very small percentage of the ideas or inventions presented to it and such rejections as are made are not based on a criteria of marketability (Finding 105). The policy of RLO is to place every idea or invention through the RLO "development" and "introduction" procedures without any substantive evaluation of any kind:

* * * * * * *

You just kind of throw it into the ring and see what comes out (Howard, Tr. 7552; see also, Winter, Tr. 1680).[12]

206. Without any adequate screening and evaluation process, little ultimate success can be anticipated. Placing every idea or invention presented to RLO through routine marketing procedures is of little or no value to clients. The record establishes [104] that such marketing procedures actually have an adverse impact on those clients' ideas or inventions that may have merit. Mr. Lang, the president of an organization which specializes in new product marketing and development, testified that you have to have test data to support a claim that a market exists for a product— "[Y]ou are never going to sell anything unless you can get through and be heard with credibility" (Tr. 3406–07). Professor Udell testified that placing

[12] RLO does not have a procedure whereby new clients' inventions are checked against files of past clients' inventions for possible duplication or a determination of feasibility. One former Account Executive testified that he processed many inventions like a "toothbrush with the toothpaste in the handle,. . .dog feces picker-uppers,. . .toothpaste dispensers,. . .automatic jacking systems on cars,. . .hoop type toys, people who were trying to emulate . . .the success of the. . .Hula-Hoop" (Duber, Tr. 4227).

in the channels of distribution unevaluated ideas is a highly ineffective approach to marketing:

> . . .The problem is that if ideas are, let's say, put into the marketplace without a previous analysis or evaluation of the marketability of that idea, you have the problem that the channels become clogged with ideas that lack feasibility.
>
> This, then, in turn raises the search cost to the corporation, and you get static in the channels of distribution and it results in a highly ineffective approach to marketing the idea because of the cost involved in searching through all of the ideas in order to find one good one. (Tr. 8349)

Only three percent (3%) of all ideas or inventions submitted to the Innovation Center are accepted for some sort of marketing effort (Udell, Tr. 8362–65).

207. The adequacy of RLO's actual marketing procedures is open to question. RLO prepares prospectuses which are mailed to corporations. Several witnesses criticized the contents of the prospectuses, the methods utilized in the selection of companies to receive the prospectuses, and the actual clerical processes. [105]

208. Mr. Lang, a marketing expert, was shown a group of sixteen (16) RLO prospectuses. He characterized some of the products identified on the prospectuses as being "clearly ridiculous and impossible and unworthy of the dignity of a prospectus of any kind." He further criticized the information shown on the prospectuses as utilizing "standard phraseologies and clauses" which indicate the prospectuses are not "founded on very careful definitive examination of what's involved." He found no basis for such standard statements in the prospectuses as existing facilities can be utilized to minimize tooling and production costs, materials may be varied to suit such facilities, standardization of components will minimize inventory costs, there is a growing demand for the product, and the product fills a long-felt need. Mr. Lang termed such "rote observations" intellectually dishonest and unlikely to attract the interest of the marketplace (Tr. 3419–24).

209. Another licensing expert, John S. Yates, criticized RLO's prospectuses as making too brief a disclosure of the invention and utilizing boiler plate language and disclosing inventions which lack novelty (Tr. 4642–44).

210. Mr. Vere L. Hageman, a mechanical engineer and Manager of New Product Development at National Lock Hardware Company, testified about the many prospectuses he had received from RLO

during a three-year period. One group of prospectuses, CX 2657–2726, was received during late 1974 or early 1975 (Tr. 1219). He criticized the inventions reported in the prospectuses as not relevant to the business of his corporation. He further stated that some inventions were "hilarious"[13] (Tr. 1221), some were "technically impractical, maybe even bordering on stupid" (Tr. 1230); perpetual motion mechanics, obviously old ideas, "three that were the same idea from three different inventors" (Tr. 1228), some were silly or incomprehensible: **[106]**

[CX 2693A, Animal Sanitation Bag] They were going to hang a bag at the back end of a dog to catch the waste. . . . To me, it was rather impractical. . . [CX 2616A, Robot Sounds Efficiency Unit] . . .I can't comprehend what the man is talking about in it at all. I can't understand it. . . (Tr. 1231)

211. Mr. Robert Goldscheider, a marketing expert, testified about several RLO's prospectuses he was asked to examine:

* * * * * * *

I believe that none of these prospectuses, not a single one can be given serious credence by a serious businessman. They are superficial. They are incomplete. They are uninformative on truly meaningful points, and I'm seriously doubtful a market even exists for any of these things as set forth in these (prospectuses) . . .So I don't want to make any personal remarks about the originators of these, but I must honestly say that I don't find any of them to be remotely serious in a realistic sense. (Tr. 5260–61; see also, Tr. 5302)

212. The methods used by RLO in determining which corporations to send invention prospectuses to are also questionable. As Mr. Udell testified:

* * * * * * *

. . .if someone is indiscriminately submitting ideas to corporations on the basis of broad industry classifications, use of the Thomas' Register, for example, where there hasn't been an attempt to qualify the firm there, that becomes much more ineffective in terms of technology transfer. (Tr. 8374) **[107]**

213. Bernard J. Murphy, a patent agent with Ingersoll-Rand Company, received approximately 350 to 400 prospectuses from RLO since 1972 (Tr. 384), and testified only about one in fifteen had any pertinence to Ingersoll-Rand's business (Tr. 398J).

214. The mailing of information about new products or inventions to industry in the form of prospectuses and circulating information about such items in publications is one accepted method

[13] Mr. Hageman also stated: "it began to dawn on me that it really is not so funny, because it seemed to me that unsophisticated inventors were paying money for ideas that — for developing and promoting ideas that obviously on the face of it had to me, in my opinion, no merit" (Tr. 1223).

of marketing new ideas or inventions. This procedure has been utilized by organizations such as the National Aeronautics and Space Administration (RX 612–13) and General Electric Company. However, RLO's mailing of prospectuses utilizing boiler plate statements and containing brief, inadequate descriptions of inventions which have not been evaluated and which lack feasibility is of little or no value to its clients.[14]

215. Some RLO clients followed up on companies to which RLO had mailed prospectuses. One client checked *Thomas' Register,* the reference used extensively by RLO to compile lists of manufacturers (Dicks, Tr. 7821, 7978–79), and found that some companies' product lines were not compatible with his invention, erroneous addresses were found, some firms were out of business, and other company names had been misspelled (Guerard, Tr. 3200–02). Another client checked the three lists of corporations to which RLO mailed his prospectuses and found firms listed that were out of business, one firm which never received any information from RLO, incorrect addresses for companies, non-manufacturing organizations, duplications of firms on the three lists, and one address that, upon checking, turned out to be a vacant lot (Shepard, Tr. 1929–35). Another client surveyed the companies to which RLO mailed prospectuses and found that one company had been out of business for years (Syversen, Tr. 2999, 3001). [108]

216. RLO has apparently upgraded the quality of its prospectuses in recent years (Dicks, Tr. 7818, 7821), and also utilizes other RLO publications such as *Innovation World* and *New Product Bank* to inform industry of its clients' inventions (RX 739–747). One RLO employee, Mr. Eugene Howard, who served briefly as RLO's Manager of Invention Licensing, began a review of RLO clients' inventions that were on hand in an unsuccessful attempt at marketing them (Tr. 7472, 7479, 7486, 7510–11, 7513). These changes have not, however, replaced the practices challenged in this proceeding or gained monetary rewards for RLO clients.[15]

C. RLO's Refund Policy

217. RLO's policy for making refunds to clients prior to 1973 was on a case-by-case basis. Since 1973, RLO's policy has been full refunds where ideas or inventions have been rejected or overpayments made; refund requests where work is in progress are

[14] RLO also occasionally gains local publicity for its clients (see RX 116). These publicity items, while perhaps fulfilling some vanity needs, are of little or no value to RLO clients.

[15] CX 2657–2726, prospectuses received by National Lock Hardware Company, most of which were received in late 1974 or early 1975, were criticized by several witnesses (Findings 208–211), indicating the inadequacies of RLO prospectuses as of those dates.

considered for pro-rata refund; no refunds are made where work has been partially completed but is delayed because of the client's lack of cooperation; and, where work has been completed, refunds are generally denied (CX 2600A–T).

218. During the period January 1976 through October 1976, subsequent to issuance of the complaint herein, RLO made eighty-six (86) partial or full refunds, totaling $14,163. All but nine (9) refunds were for Preliminary Product Research Agreements (Dicks, Tr. 7823–29). Summaries of refunds made in years prior to 1976 were apparently available but not offered in evidence (Dicks, Tr. 7827).

219. As is evident from RLO's statement as to its refund policy, refunds where work has been completed are generally denied. Thus, RLO makes no refunds on the basis that its services are of little or no value to its clients. [109]

XII. ACTIVITIES OF INDIVIDUAL RESPONDENT LAWRENCE PESKA

A. Responsibility for and Control Over RLO's Challenged Practices

220. In 1964, prior to RLO's incorporation, Lawrence Peska was employed by Raymond Lee and National Patent and Trademark Company (which subsequently became an affiliate corporation of RLO). When RLO was incorporated in January 1967, Peska became the vice president of RLO and of its subsidiaries and affiliates. Peska's employment in this capacity continued until November 1972, when he voluntarily left RLO (Peska Ans. ¶1; ¶3 Peska Affidavit Attached to "Motion of Respondent Lawrence Peska for Summary Decision," dated October 31, 1975; CX 374B, ¶7; CX 2601Q; Peska, Tr. 4780, 7100).

221. Peska's functions did not immediately change with RLO's incorporation in 1967 and his being named RLO's vice president (Tr. 4783). His duties did, however, become more defined as the company grew (Lee, Tr. 5077, 5080; Peska, Tr. 7100). While an employee and vice president of RLO, Peska's duties included:

> . . .primary responsibility for sales and for communications between the Corporation and all others. He had direct day-to-day responsibility for the Corporation's operations, particularly sales, purchasing, administrative management, personnel, general procedures, advertising and sales promotion (CX 2601Q, ¶15).

As vice president of RLO, Peska was "second-in-command as to all phases of [RLO's] business" (CX 374C), and he devoted his "entire working time to [his] duties as an officer of [RLO]" (CX 377A; Peska, Tr. 4811). In 1972 when Peska's RLO employment terminated, his

major area of responsibility was for public relations with both RLO clients and the public (Peska, Tr. 4846, 7100–01, 7306–07; Traube, Tr. 5138). [110]

222. During his employment at RLO, Peska met with Raymond Lee on a daily basis to discuss the operations of RLO including advertising, public relations, fees charged clients for various programs, salaries and performance of RLO employees, and to assist Lee in determining the direction the company should take (Peska, Tr. 4861, 4879–80, 7110, 7116, 7135–36; Lee, Tr. 5083).

223. Peska established corporate policy in those business areas for which he was responsible and he functioned "substantially autonomous within those responsibilities" (Lee, Tr. 5085–86; Peska, Tr. 7307).

224. At various times during his employment at RLO, Peska:

(1) sold RLO services to clients (Peska, Tr. 4822–23; Lee, Tr. 5079);

(2) had authority to hire and fire account executives and participated in their training (Peska, Tr. 4842, 4878, 7124–26, 7302; Lee, Tr. 5070, 5079–80, 5084);

(3) had responsibility for marketing or introducing RLO clients' inventions to industry (Peska, Tr. 7667; Lee, Tr. 5079);

(4) made trips around the country to see RLO clients (Peska, Tr. 7126–27);

(5) participated with the patent attorneys and Lee in adding embellishments to RLO clients' inventions (Peska, Tr. 7102);

(6) had responsibility for administrative matters including the flow of correspondence and fulfillment of requests for inquiry material (Peska, Tr. 4793–94, 7116, 7124); [111]

(7) helped draft RLO's contracts and form letters (Peska, Tr. 7302);

(8) helped update the materials sent to potential RLO clients (Peska, Tr. 7303–04); and

(9) signed or authorized others to sign his name to contracts and correspondence to clients and public officials (CX 131, 162, 165, 174–75, 179, 348A–B, 619, 881, 1030A–B, 1034,

1036A, 1071-73; Peska, Tr. 4798, 4826-27, 4973-74; Lee, Tr. 5080, 5082).

225. In addition to the above enumerated activities, Peska had extensive responsibilities in the advertising area throughout his employment at RLO. He had primary responsibility for creating and placing advertisements in various media either as vice president of RLO or through his solely-owned advertising agency, LPA (Peska, Tr. 4783-84, 4829, 4831-34, 4970, 7304-05; Lee, Tr. 463, 5077-78, 5085, 5087-88; Traube, Tr. 5138-89). Peska was responsible for the promotional brochures distributed by RLO to potential clients (Peska, Tr. 4786, 4788, 7143, 7303). News releases of clients inventions were also within Peska's area of advertising responsibilities (Peska, Tr. 4863; Julien, Tr. 8134). Starting in approximately 1970, Peska served as Editor of "Innovation World," a publication developed to keep in touch with industry, and was responsible for its preparation and coordination of its printing (Peska, Tr. 4897-4900; Julien, Tr. 8134).

B. Peska's Current Responsibility for LPA Practices

226. Individual respondent Lawrence Peska is, and throughout LPA's existence has been, the President and sole stockholder and director of LPA (CX 2607B; Peska, Tr. 4780, 4931-33, 7093, 7175-76). By 1972, LPA's work was almost exclusively for RLO (Peska, Tr. 4846-48). When Peska's employment at RLO ended, the business of LPA changed from that of an advertising agency to being an idea promotion firm (Peska, Tr. 4928-29, 7092-93, 7146, 7176-77). As of November 1972, respondent Peska's duties [112] at LPA were primarily of an administrative and supervisory nature (CX 2607B). From November 1972 to July 15, 1975, the business of LPA was "[p]rimarily the development, introduction and marketing of new products" (Peska, Tr. 4929-30; CX 2607B).

227. LPA and RLO have been and are direct competitors in the idea or invention development business (Peska, Tr. 4953-54, 7608; sworn affidavit attached to "Motion of Respondent Lawrence Peska for Summary Decision" dated October 31, 1975, ¶5). Respondent Peska testified that LPA and RLO compete in that both firms are "looking for inventions and offering services to inventors" (Tr. 7648).

228. In the course and conduct of its business, LPA has engaged in interstate commerce. Since 1972, LPA has solicited clients and has sold its services throughout the United States through various interstate media including newspapers, magazines, use of the mail, long distance telephone calls and inventors seminars (Peska, Tr.

4946-47; CX 2232, 2234, 2236-37, 2240, 2245-46, 2254W-X, 2378A, 2434I, 2595, 2615-17, 3000-01, 3003A-E, 3004A-D, 3005, 3034W-X; RPX 15). Promotional literature distributed to clients and potential clients list regional LPA offices throughout the United States and international LPA offices in Canada and Australia (CX 2254Z, 2613C, 3023H, 3034Z; RPX 15-19).

229. Sales generated by LPA's promotional activities have been and are substantial. For example, LPA's gross sales for 1974 were approximately one and one-half million dollars (Peska, Tr. 4938).

230. LPA's methods of dealing with clients followed a pattern similar to those of RLO. The business forms used at LPA in 1973 were written by respondent Peska and were similar to those used by RLO (Peska, Tr. 7603). From 1973 through 1976 services offered to clients such as a preliminary product search, development and marketing programs, and a Canadian Patent and Marketing program were identical or similar to services offered by RLO (Schwartz, Tr. 4040-41, 4046-47; Duber, Tr. 4235, 4254; Peska, Tr. 4934-37, 4963-64, 7607-08; Traube, Tr. 5181-83, 5183-87; CX 2259A-D, 2261A-C, 2264A-B, 2265A-B, 2278-79, 2282A-C, 2284A-C, 2299A-B, 2300, 2302A-D, 2312, 2314A-B, 2349, 2351A-C, 2425, 2427D-F, 2486I-J, 2488, 2496A-C, 2609-10, 2611A-C, 3921A-H; RPX 16). In 1976, LPA changed [113] the programs it offers to clients to eliminate patent procurement services but continues to offer development and marketing programs to inventors (Peska, Tr. 7176-77, 7180-86, 7211, 7609).

231. In formulating LPA's business practices, respondent Peska adopted many of the methods of operation employed by RLO during his tenure as RLO's vice president which are challenged in this proceeding. For example, LPA:

(1) has represented, directly, indirectly, and by implication, that it actively and successfully introduces its clients' ideas or inventions to industry when only approximately 25 licensing agreements have been executed on behalf of LPA's 4100 clients and only 7 of these clients have earned money in excess of amounts paid to LPA (CX 2254B, 2305F, 3021A-B, 3023F, 3034B; RPX 15, 17, 19, 20A; Hudak, Tr. 2733; Peska, Tr. 4955-56, 7211-13; Traube, Tr. 5192);

(2) has represented, directly, indirectly, and by implication that it provided a fair, adequate and thorough appraisal of the patentability or merit and marketability of LPA clients' ideas or inventions when no such appraisal or evaluation was done (Torre, Tr. 2595-97; Levine, Tr. 2661-63, 2667; Hudak, Tr. 2711;

Amins, Tr. 3730; Peska, Tr. 7640-42; CX 2259A, 2261A-B, 2264A-B, 2265A-B, 2299A-B, 2300, 2302B, 2305B, 3023B-G; RPX 16-17);

(3) has represented, directly, indirectly, and by implication that it will substantially develop or technically refine LPA clients' inventions or ideas when no development or refinement has been done (Bradner, Tr. 2650; Hudak, Tr. 2719; Heiner, Tr. 3534; CX 2282A-C, 2305F, 2314A-C, 2351A-C, 2427D-F, 2496A-C, 3003A, 3023F; RPX 17, 19); [114]

(4) has, without authorization, used the names, titles, photographs and quotations of prominent public figures in its promotional literature which use could create a false impression that such individuals had endorsed LPA or its services (Garelik, Tr. 2754-57, 2764; Javits, Tr. 4450, 4454-56; Peska, Tr. 4807-09, 7275; CX 2201-03, 2344H, 2580-05, 3029-32, 3103, 3105, 3107; RPX 3-11).

XIII. RLO'S CURRENT TRAINING AND SUPERVISION OF ACCOUNT EXECUTIVES

232. RLO contends that, after the termination of Peska's employment in November 1972, substantial improvements were made in RLO's business operations including its method of hiring, training and monitoring Account Executives as well as its advertising (RPF, p. 12; Julien, Tr. 8056-57, 8058-59, 8061-63; Friedman, Tr. 6222-54, 6257-58 (Jan. 14, 1977); Salamone, Tr. 6647-51, 6653-55, 6658-59, 6661-64).

233. Since September 1, 1973, Mr. Sifton (Si) Friedman, in his capacity as supervisor of RLO's Sales Department, has been responsible for the training and supervision of all RLO Account Executives (Friedman, Tr. 6219, 6271).

234. Mr. Friedman described the training RLO new Account Executives currently receive as follows:

A. The training for a new account executive is very intensive and takes anywhere from two weeks to possibly three, and this is a one-on-one procedure, day by day with myself and that trainee covering all aspects of our proposals, how we must relate to the prospective clients. He hears me. I hear him and he's constantly monitored throughout the process until he gets to know everything. [115]

Q. Is there special training facilities at your offices for these purposes?

A. Yes. We have a special room set aside for that purpose and in there we have a telephone facility where both sides of the conversation would be heard (Friedman, Tr. 6222).

235. Testimony of present and former Account Executives trained by Mr. Friedman as to the length of training received was in conflict. Mr. Pion testified he received one full day of training and was watched closely for two to three weeks (Tr. 6928–29); Mr. Pedersen testified he received three weeks of training (Tr. 5955–56); Ms. Bartlett testified that after four days of training she was given her own desk, but that training basically continued over the first two weeks (Tr. 6961–63); Mr. Peckham testified he received ten days to two weeks training (Tr. 7016–17); Mr. Duber testified he handled calls after a day and a half of training, but that Mr. Friedman listened to him for about a week (Tr. 4192); Mr. Glass testified he received approximately three days of training (Tr. 3814–15).

236. Mr Friedman testified that in March 1975, he wrote RLO's "Glossary of No-No's" which was thereafter distributed to all Account Executives (Tr. 6255–57 (Jan. 14, 1977)). This glossary listed words, statements and innuendos which Account Executives were prohibited from using during their conversations with clients and potential clients of RLO (CX 2602C–D).

237. Phrases prohibited in the "Glossary of No-No's" which relate to representations challenged in this proceeding include, but are not limited to:

We APPRAISE or give an APPRAISAL

* * * * * * *

We EVALUATE or give an EVALUATION

* * * * * * *

We think it is MARKETABLE or PATENTABLE or PROMISING. [116]

* * * * * * *

We are PATENT ATTORNEYS or have PATENT ATTORNEYS ON STAFF

* * * * * * *

The fee stated (development program) is YOUR ENTIRE COST. (CX 2602D)

238. Although current RLO Account Executives testified they had received the glossary and were instructed to adhere to its prohibitions (Pedersen, Tr. 5989–90; Bartlett, Tr. 6962), former Account Executive Paul Duber testified as follows:

Q. What use did you make of this glossary of no-noes for account executives, if any? (Tr. 4196).

A. Well, it was read over and it was never enforced. It became, actually it became a joke amongst the account executives. It was never enforced by Si Friedman who was our direct superior, or anybody else. (Tr. 4197)

(See also, Duber, Tr. 4337, 8307-09; Glass, Tr. 3881-82, 3916-17; Schwartz, Tr. 4022).

239. Prior to September 1975, RLO's only means of monitoring some Account Executives' telephone conversations with clients and potential clients "was in the form of extension telephones" (Friedman, Tr. 6223; Julien, Tr. 8112-15, 8148-49). Former Account Executives testified that during their employment at RLO they had no knowledge of the existence of any monitoring system or equipment (including a system of extension phones), and were never told their conversations with clients had or would be monitored (Coyle, Tr. 1534-35, 1649; Glass, Tr. 3812, 8446-47, 8451-52; Peska, Tr. 7277, 7279; Duber, Tr. 4188, 8301-02, 8331-32, 8339; Winter, Tr. 8167-68). [117]

240. In September 1975, RLO, in connection with moving into different quarters, installed a sophisticated telephone monitoring system (S. Friedman, Tr. 6224-26, (January 14, 1977); Julien 8111-15; CX 625). By means of this system, Friedman can now monitor, on a random basis some of the telephone conversations of RLO Account Executives with clients and potential clients (Friedman, Tr. 6225-27, 6275).

241. Current RLO Account Executives who were hired after installation of the monitoring system testified that they were informed of the existence of such a system and were aware that such monitoring was still taking place (Pedersen, Tr. 5959; Pion, Tr. 6903, 6910; Bartlett, Tr. 6963-64; Peckham, Tr. 7019, 7074).

242. While proper training, a glossary of "No-No's" and telephone monitoring are practices which could have a desirable impact on RLO's operations, the record does not indicate that such programs were rigorously enforced by RLO, or adhered to by Account Executives. Their effect on RLO's total operations were minimal (Lean, Tr. 8187-8293). Strict adherence to a glossary of "No-No's" and constant telephone monitoring of Account Executives, at best, would serve to eliminate only the most direct and flagrant misrepresentations which this record demonstrates RLO has made to potential clients. [118]

CONCLUSIONS

A. FACTUAL SUMMARY

The findings of fact set forth in detail the business operations of

RLO, and the section of those findings discussing the value of RLO's services to its clients is a summary of some of the most pertinent facts of record. Briefly, RLO is engaged in the business of providing patenting, development and marketing services to persons with ideas or inventions for new products (Finding 5). The complaint challenges the statements and representations which RLO makes regarding its business and professional qualifications and the services it will provide to clients, the services RLO actually renders to its clients, and the value of such services to its clients.

Individual respondent Raymond Lee was the founder of RLO and since its incorporation in 1967 has been its sole stockholder, President and Director. In such capacity he has been primarily responsible for RLO's business operations, formulating, directing and controlling its acts and practices (Finding 3).

Individual respondent Lawrence Peska was, until November 1972, Vice President of RLO, and second-in-command to Lee. In this capacity he was instrumental in formulating, directing and controlling the acts and practices of RLO (Finding 4). The acts and practices challenged in this proceeding were implemented at RLO during Mr. Peska's tenure as Vice President and have not changed meaningfully since his RLO employment terminated. Consequently, references to RLO's practices in this decision apply to practices for which Mr. Peska was in large part responsible and his current disassociation does not relieve him of any individual liability he has for the formulation and adoption by RLO of the challenged acts and practices. After Peska left RLO, he immediately commenced his own invention development and marketing business patterned generally after the RLO operation (Findings 226, 230–1).

From 1962 until 1967, respondent Raymond Lee operated as a sole proprietorship under the name Raymond Lee Organization (Finding 5). The proprietorship's operations were small, the staff consisting of Lee, [119] Peska, and two other employees (Peska, Tr. 7096). In 1967 RLO was incorporated. By 1972 there were 40–50 employees at RLO (Peska, Tr. 4819), and in 1975 there were approximately eighty-five employees (Lee, Tr. 459–463; Julien, Tr. 8152–53; CX 2790–92). Sales receipts have exceeded one million dollars for the past several years (Finding 23), and in 1975 over 5,000 clients contracted for various RLO services (Findings 12, 16). A substantial percentage of RLO's business operations is conducted through the mail and over the telephone (Finding 24).

RLO relies heavily on advertising, primarily in newspapers, magazines and yellow pages of telephone directories to initially contact potential clients (Finding 6). Potential clients who respond to

advertisements are mailed or presented with an Inventors Information Kit consisting of numerous brochures, flyers, and other promotional materials, including a Record of Invention form. The potential client is urged to record his idea or invention on the Record of Invention form and promptly return it to RLO for examination for the purpose of receiving RLO's "comments and suggestions for the international development and introduction of this invention to industry" (CX 50, 52, for example). Salesmen (termed Account Executives by RLO) follow-up by telephone and CALL-TELEGRAMS to encourage return of the Record of Invention form (Findings 8, 35; CX 2813A).

If the Record of Invention form is returned to RLO, Account Executives offer potential clients the services of RLO. First, preliminary product research is urged to provide information about some inventions that have already been developed in the field. Copies of United States patents found during this patent search are to be furnished the client along with RLO's "confidential findings" and its "recommendation" for the development of the invention, and arrangements by which RLO would accept a participating interest in the invention (Finding 41). The potential client is advised that this preliminary product research should be conducted at once as time is important (Findings 10, 61). [120]

If the potential client accepts the Preliminary Product Research Agreement, within a few weeks the client receives, either through the mail or in person at RLO's headquarters, copies of approximately five or six United States patents located during the research, together with a letter development contract outlining RLO's procedures for developing and introducing to industry the client's idea or invention (Finding 42). The letter states that for a specified fee and the assignment of a twenty percent (20%) interest in the client's idea or invention RLO will technically develop and refine the idea or invention, retain a patent attorney to prepare a patent application on the idea or invention, and proceed immediately to develop the idea or invention and introduce it to industry (Findings 13, 65, 119; CX 100).

Clients who receive the research results and the development contract in the mail are contacted by an Account Executive, usually by telephone, to encourage the immediate execution of the contract and its return to RLO (Finding 13). Clients who visit the RLO offices in New York are given the research results and the development contract in person by an Account Executive.

After execution of the development contract and payment of the specified contract fee, RLO prepares drawings of the idea or

invention which, after approval by the client, are forwarded to the patent attorney retained by RLO for preparation of a patent application (Finding 120). As soon as patent pending status is obtained through the filing of the patent application,[16] RLO prepares a prospectus describing the invention which is mailed to approximately one hundred industrial concerns and organizations (Findings 14, 207). Descriptive paragraphs of some clients' inventions are included in RLO publications entitled *Innovation World* and *New Product Bank* which are circulated to industry (Finding 216). RLO also, on occasion, generates some local publicity for its clients (CX 1115; RX 116). [121]

If a corporation, after receiving an RLO client's prospectus, requests further information about the idea or invention, RLO will respond to the corporation's inquiry. On occasions when clients complain about the lack of response from corporations, RLO will circulate prospectuses to additional corporations (Syverson, Tr. 2986, 2993–94).

RLO has had very limited success in licensing or selling the ideas or inventions of its clients to industry (Findings 20, 58, 194). RLO presently advises potential clients in the State of California, pursuant to statutory requirement, that only three of thirty thousand clients have received more in royalties than they have paid RLO in fees (Finding 22).

B. Complaint Allegations

1. *Respondents Fail To Provide a Fair, Adequate and Thorough Appraisal of Their Clients' Ideas or Inventions and Do Not Successfully Introduce Such Ideas or Inventions to Industry*

Complaint Paragraphs Seven and Eight, subparagraph Five, allege that respondents will successfully introduce, promote and license RLO's clients' ideas or inventions to industry, but that respondents, in a significant number of instances, do not provide this service to clients. Complaint Paragraphs Seven and Eight, subparagraph Six, allege that respondents represent they will, but, in a significant number of instances, fail to provide a fair, adequate and thorough appraisal of the patentability or merit and marketability of their ideas or inventions prior to the time potential clients contract for RLO services. Representations that RLO will successfully introduce clients' ideas or inventions to industry are interrelated with

[16] At this point the client is offered the Canadian development program. About 10% to 15% of the clients who accept the United States development program also accept the Canadian program (Finding 17).

representations that RLO will provide a fair, adequate and thorough appraisal of clients' ideas or inventions and, considered together, allegations relating to these representations constitute the central issue in this proceeding.

Respondents have represented through advertisements, brochures, letters, and a course of dealing that they will develop an inventor's idea or invention and introduce [122] it to industry. These representations include statements that RLO is highly knowledgeable and experienced in the field of invention developing and marketing, that it is held in high esteem by clients, corporations and high public figures, that it has broad access to corporations who are actively seeking new products through RLO, and that some of its clients have been highly successful (Findings 44–52). RLO's advertisements, brochures, letters and course of dealing also represent to clients that the client will need a specialist to evaluate the idea or invention, and that RLO, which has that experience and expertise, will examine the potential client's idea or invention and, if it is acceptable to RLO, suggest a procedure for its development and commercialization (Finding 59).

RLO's course of dealing is very significant in creating the impression in the client's mind that his idea or invention has been evaluated by RLO and thus has a good chance of being successfully marketed. First, through advertisements and brochures, the client has been impressed with RLO's corporate reputation. The Record of Invention form which the potential client is requested to complete and return to RLO states that RLO will examine the idea or invention for the purpose of submitting a suggested procedure for its "international development and introduction to industry" (Finding 60; CX 50). It is represented that RLO will promptly inform the potential client if the idea or invention cannot be *accepted* by RLO.

Once the Record of Invention form has been returned to RLO, the potential client receives a letter stating that RLO has completed its examination of the idea or invention and is recommending that the client authorize preliminary product research which RLO will perform at a modest cost and which research should be commenced at once (Finding 61). Account Executives contact potential clients and make various statements to encourage execution of the agreement, such as RLO desires to have preliminary research conducted before making recommendations as to the development procedure to be followed, or the idea or invention is interesting or feasible, or it is a good investment (Findings 63–64). [123]

Once the preliminary research is completed, the client is then sent a development proposal in the form of a personalized letter, together

with copies of United States patents. The client is advised that the preliminary research has been completed and RLO is ready to accept a twenty percent (20%) interest in the invention and proceed immediately to have the invention patented and developed for sale to industry (Finding 65).

Account Executives, salesmen who receive a commission on the sale of RLO services, contribute to the client's impression that the idea or invention will be successful (Finding 53). They testified in this proceeding that you have to indicate to the client that there is a good opportunity for success, otherwise, they are not going to spend the money, necessary to obtain RLO services (Findings 54, 66–69, 71).

RLO's advertisements and brochures create the aura that RLO is experienced, knowledgeable, and successful in the development and introduction of inventions to industry, with the respect and esteem of high public officials, and the gratitude of many clients and corporations who have been assisted by RLO. The procedure whereby a potential client's idea or invention is examined and accepted by such a corporation creates the impression it is a worthwhile invention. This impression is heightened by the recommendation that a patent search be performed and, after completion of the search, the fact that RLO will accept an interest in the idea or invention and will seek a patent on it. One former Account Executive testified that if RLO makes a proposal, it must convey the impression the idea or invention is feasible and marketable (Winter, Tr. 1754–57).

In sum, RLO's entire advertising representations, oral representations by Account Executives, and its method of operation are designed to create in the minds of potential clients the definite understanding that their invention has been examined and studied by a competent, knowledgeable and experienced organization who has determined that the idea or invention is worthy of presentation to industry and that there is a good chance it will be successful. [124]

RLO contends its written agreements with clients are clear on their face as to what RLO will and will not do, and that RLO clients who testified in this proceeding read and understood the contracts (RPF, pp. 36–40; RRF, p. 63).[17] RLO also contends it agrees to

[17] One RLO client testified about the RLO contracts as follows:

". . . .I have to admit that I didn't really pay much heed to the reading of it.

. . . . . .

"Well, I relied on their integrity. They had advertised so copiously and they had so many brochures of selling. They had photographs of various clients of theirs who have written in glowing terms saying that they had received excellent treatment and were very satisfied. So on the basis of those rather than paying too much heed to all this. . .I went ahead. . ." (Mullen, Tr. 1887–1888)

"introduce an invention to industry (by methods it describes in plain, easy to understand words) and to 'seek opportunities to negotiate' " for sale or licensing of the invention (RPF, p. 26); that RLO delivers "market exposure" (RPF, pp. 40, 54); that it does not appraise clients' inventions as to patentability or merit and marketability, as it would be foolish, ineffectual and, indeed, deceptive for RLO to do so (RPF, p. 36).

The statement in the RLO preliminary research agreement that the RLO proposals "shall not be construed as a recommendation based upon an evaluation" by RLO of the client's idea or invention is contradictory to language in the letter accompanying the agreement which states that RLO "would like to suggest" a course of action, and that, following the completion of the preliminary research, the client "will receive the confidential results of our findings. . . . Our recommendation for the development of your invention, and arrangements on which [RLO] would accept a participating interest" in the client's invention (CX 96, 204). [125]

The development contract statement that the enclosed references will aid "You in your evaluation" of whether to proceed is ambiguous at best and contradictory to the entire development proposal being offered whereby RLO is willing to take a twenty percent (20%) interest in the idea or invention, retain a patent attorney to prepare a patent application and pay a proportionate share of fees agreed upon, sell this interest back to the client for $1,000 within six months, and requests authorization from the client for RLO to proceed immediately (CX 100). The statement in the development contract that RLO cannot give assurances of financial success is also ambiguous and can be understood to convey the limited idea that RLO does not *guarantee* success, but does not inform potential clients that the financial success of RLO clients to date has been minimal (Findings 56–58, 72).

Nowhere in RLO's advertisements, brochures, or agreements is there a clear statement that RLO has not or will not evaluate the client's idea or invention, that evaluation is entirely up to the client, and that RLO is making no recommendation of any kind. RLO cannot seize upon brief, imprecise clauses in its agreements to overcome contradictory representations in the numerous direct statements made orally and in advertisements, brochures, and letters, and the contradictory implications created through its course of dealing. RLO, represented to have the expertise to advise and assist inventors, now argues that it merely promises routine market exposure to ideas or inventions of unsophisticated clients who do their own evaluation.

This proceeding is concerned with an uninformed public dealing in a highly technical area about which there is little general information available. Persons who believe they have come up with an idea or invention are particularly susceptible to the promotional tactics utilized by RLO. The obscure, ambivalent and somewhat ambiguous statements in the contracts which RLO relies upon to convey to potential clients a clear understanding of its services cannot overcome the substantial and continuing misrepresentations that RLO has otherwise made. [126]

2. *Respondents Do Not Technically Develop and Refine Clients' Inventions*

The complaint, Paragraphs Seven and Eight, subparagraph Four, alleges respondents represent they will substantially develop or technically refine clients' ideas or inventions submitted to them, but that respondents do not render this service to clients in a significant number of instances.

RLO's advertisements, brochures and letters represent to the client prior to the signing of the development contract that RLO, an organization knowledgeable in the development and introduction of inventions to industry, will take the idea or invention all the way from an idea to placing it in proper form for presentation to industry (Findings 110, 112–116). Other representations made by RLO include a letter written by a Texas Judge which states, in part:

> It is my belief, that if my product cannot be put on the market by the Raymond Lee Organization, it cannot be done (CX 47, 51).

RLO's development contract represents that RLO will:

> A. . . .first technically develop and/or refine your invention, if and to the extent necessary, for the preparation of suitable illustrations, and description of the commercial features you regard most important. (CX 840; see also, CX 100, 367, 1022, 1208, 2149)

RLO contends that "the obvious focus of this provision is the preparation of sufficiently professional drawings of the consumer's invention to facilitate introduction of the invention to industry and permit the independent patent agent or attorney to use them" (RPF, p. 31; Finding 120). [127]

The language used by RLO in the development contract is of a technical nature. It is capable of being understood by ordinary persons who have read RLO's advertisements and brochures and are inexperienced in the marketing of inventions to mean that RLO will perform whatever services are necessary to make the invention

marketable to industry. RLO clients testified that they believed RLO would take the idea or invention "from the beginning to the end," "the package deal," "the whole thing," "this company took care of everything" (Findings 124–128).

RLO clients are led to believe and therefore have a reasonable expectation that the technical development and refinement of their invention will involve more than the mere preparation of drawings for use in filing patent applications and in preparing prospectuses. Accordingly, it is concluded that RLO does not substantially develop and technically refine its clients' ideas or inventions (Findings 123, 129).

3. *Respondents Do Not Disclose That Additional Fees May Have To Be Paid by Their Clients*

Complaint Paragraphs Seven and Eight, subparagraph Three, alleges that respondents represent that no additional fees will be incurred by RLO clients after entering a development contract when, in fact, such additional fees will arise. Representations that no additional fees will be charged are impliedly made through respondents course of dealing by their failure to fully advise clients of the total fees they are likely to incur in developing their idea or invention.

RLO's sales procedure is to initially sell clients a preliminary product research contract for a fee of $100 or more (Findings 9, 131). No disclosure is made at this time of the additional services RLO will later recommend or the additional fees which will be required for these services (Findings 131, 132). Within a few weeks, RLO presents the client with a development contract. This contract states that individual inventors ". . .acting on their own may find it necessary to retain various specialists such as engineers, lawyers, draftsmen, technical writers, patent attorneys, marketing [128] organizations and sales agencies, etc." Thereafter, the contract states that RLO has assembled a staff and retains, as needed, qualified independent contractors, for carrying out many of the important steps for introducing an invention to industry. RLO quotes the client a specified sum for the development proposal (Finding 133). The contract also says that RLO, which will have a twenty percent (20%) interest in the invention, will pay its proportionate share of government fees and, "if prosecution of the patent application is agreed upon, [RLO] will pay its proportionate share of those fees and costs upon which we mutually agree" (Finding 134).

The record is clear that clients are not informed of all the fees or costs which a client is likely to incur in following through on RLO's

development program which are *in addition* to the fee specified in the development contract (Findings 135–36). These costs are known to RLO and should be clearly disclosed to potential clients prior to the execution of any contract (Findings 140, 141). RLO's step-by-step approach to sales is designed to get clients involved in the invention development process without truthfully disclosing all costs which may be involved. Such a procedure is not only deceptive, it is unfair.

4. *Respondents Failed To Disclose to Their Clients That Raymond Lee and RLO Are Not Authorized To File and Prosecute Patent Applications*

Complaint Paragraphs Seven and Eight, subparagraphs One and Two and Paragraph Twelve, subparagraph Two, all relate to respondents' failure to disclose that neither RLO nor Raymond Lee are qualified or recognized to file and prosecute patent applications on behalf of RLO's clients. Use of Mr. Lee's qualifications and professional experience are also alleged to impliedly misrepresent that he is a registered patent attorney or agent.

Respondents' advertisements and brochures stress the educational and professional qualifications of Raymond Lee, Founder - President of his namesake company, the Raymond Lee Organization (Findings 142–45). Lee's qualifications in the brochures are prefaced by the word *former,* as follows: [129]

Founded by Raymond Lee, B.S.I.E., (LL.B) former:
U.S. Patent Office Examiner
U.S. Dept of Army Patent Advisor
U.S. Registered Patent Attorney
Canadian Registered Patent Agent
Advisor to the TV series "The Big Idea."

Another brochure states:

The Founder-President of the Company, Raymond Lee, has degrees in Industrial Engineering and Law, and has had extensive experience with inventions and new products. He is a former: United States Registered Patent Attorney, Canadian Patent Agent, United States Patent Office Examiner and United States Department of Army Patent Adviser. (CX 44D, 45D, 46D)

The ordinary person, unskilled in patent matters, and not fully comprehending the requirements of practice before the Patent Office, may not appreciate the full implication of the word *former,* as used in RLO brochures. Such statements could reasonably be understood by potential clients to represent that Raymond Lee is currently a private, as compared to government, patent attorney or

agent and is qualified to file and prosecute patent applications on behalf of RLO clients (Finding 145).

RLO promotional brochures also repeatedly emphasize the high qualifications and expertise attributed to RLO's staff in respect to patents with statements such as:

> Our Product Research Department will act as your Intelligence Agency . . . [to] . . . probe and study . . . the related records of the United States Patent Office. They search prior U.S. patents. . . They wind their way through Patent Office corridors often talking to Patent Office Examiners. . . [130]

> Each person in our Product Research Department . . . is a specialist in his field, in some cases having been an Official Examiner in the U.S. Patent Office where he received his "basic training." (CX 44I, 45J, 46I, 2604H; see also, Findings 146-47).

These brochures are likely to create an understanding on the part of potential clients that RLO is qualified to prepare, file and prosecute patent applications. Brochures which refer to RLO retaining, as needed, independent contractors to establish "patent pending" status (CX 46O, 49D, 2604H) do not preclude an understanding on the part of prospective clients that RLO is qualified to prepare, file and prosecute patent applications by reason of retaining patent attorneys or patent agents on its staff (Finding 148).

The first services which RLO offers to potential clients is a search of Patent Office records. At this juncture, absent a clear disclosure to the contrary, potential clients may reasonably infer that Raymond Lee and/or RLO are qualified to handle all aspects of patentability as may be necessary in the course of marketing inventions, which would include prosecution of patent applications before the Patent Office (Finding 150).

Having created the potential for deception, respondents had a duty to affirmatively disclose to potential clients that Lee and RLO were not registered patent attorneys or agents and were not qualified to prepare, file or prosecute patent applications before the Patent Office.

5. *RLO's Unauthorized Use of the Names, Photographs and Quotations of Public Figures in Its Promotional Literature*

Complaint Paragraphs Seventeen and Eighteen allege that respondents have, without authorization, used the names, photographs and quotations of public figures in their promotional literature and that such use has misled potential clients into the erroneous belief that RLO or its services have been endorsed by these [131] officials. Complaint counsel contend that, relying on this

mistaken belief, potential clients have purchased respondents' services.

Many promotional brochures distributed to potential clients by RLO contained the names, photographs and quotations of prominent public officials impliedly endorsing or recommending RLO or its services. Quotations set forth in such brochures were excised from routine responses written by such officials after receiving a letter from RLO advising them of services RLO provides which might be of assistance to their constituents. The photographs reproduced in conjunction with such quotes were obtained by requesting photographs from the respective officials' office without disclosing RLO's intended commercial use (Finding 169).

Brochures utilized by RLO under a heading "A FEW WORDS FROM SOME PROMINENT NATIONAL LEADERS" set forth photographs and quotations of former United States Senator Peter H. Dominick of Colorado, former Congresswoman Julia Butler Hansen of Washington, United States Senator Jennings Randolph of West Virginia, and former Governor Dewey Bartlett of Oklahoma, now a United States Senator. A variation of this brochure sets forth photographs and quotations of Congressman William B. Widnall of New Jersey and former Congressman Alphonzo Bell of California (Finding 170). Another RLO brochure reproduces photographs and quotations of United States Senator Hubert H. Humphrey of Minnesota, former Governor Kenneth M. Curtis of Maine and former United States Senator John V. Tunney of California. A letter from former Congressman Alphonzo Bell of California written on Congressional letterhead, from which the date has been deleted and a photograph of Congressman Bell is reproduced in another RLO brochure (Finding 172).

Senator Randolph, former Congressman Bell and Senator Bartlett testified that they had never endorsed RLO, had never granted permission to RLO to use their photographs, titles or quotations in RLO promotional literature, permission for such use had never been requested, and they unanimously objected to such use. Correspondence to RLO from these witnesses, as well as such correspondence from Senator Humphrey and former Senators Dominick and Tunney, objecting to RLO's unauthorized commercial use of their photographs, titles and letter quotations were also received in evidence (Finding 173). [132]

RLO promotional brochures also contain photographs of John V. Lindsay, former Mayor of New York City, awarding a "Declaration of Commendation" to Mr. Raymond Lee and reproduce a facsimile of this commendation. Many of the brochures containing former Mayor

Lindsay's photograph state in bold type on the cover page that RLO is "INTERNATIONALLY KNOWN BY GOVERNMENT COMMERCE & INDUSTRY FOR ITS SUPPORT LEADERSHIP & INTEGRITY" (Finding 175).

The "Declaration of Commendation" was devised by the City of New York to show its appreciation to individuals and organizations doing business in New York City for their participation in a program offering assistance to small business in the city via the Executive Volunteers Corps and to publicize this program (Finding 176). Neither Mayor Lindsay nor the New York City Department of Commerce had intended to endorse the commercial enterprises of the recipients of these awards. Mayor Lindsay's permission to use his photograph in RLO brochures had never been requested nor had such permission been granted (Finding 177).

Promotional brochures sent to potential RLO clients also contained a photograph of an RLO client, Mr. Hatch, shaking hands with President John F. Kennedy. This photograph was forwarded to RLO by Mr. Hatch for use in its advertising programs, but it is apparently unrelated to any relationship between RLO and Mr. Hatch or President Kennedy (Finding 178).

RLO's position with regard to its unauthorized use of public officials' photographs, titles, and quotations in its promotional literature is that "[t]he First Amendment protects RLO's accurate statement and portrayals, whether consented to or not" and that if any cause of action arises from such unauthorized use it is solely a private right (RRF, pp. 32–33; RPF, pp. 49–50). The record also discloses that when requests were received from public officials to discontinue the unauthorized commercial use of their photographs and letters in RLO promotional literature, RLO asserted it had the right to use such letters and did not promptly comply with these requests (Findings 179–80). [133]

RLO further asserts that use of public officials' titles, names, photographs and quotations in its promotional literature was not intended to constitute an endorsement of RLO by the cited official, nor could such materials be construed as an endorsement. While denying any intent to imply endorsement by the public officials, RLO has advanced no other commercial reason for inclusion of these photographs and letter quotations in its promotional literature (Finding 181). Use of the titles, names, photographs and quotations of public figures in conjunction with statements such as "Internationally known by government. . .for its support and leadership", "Words of Praise from some of our clients" and "A few words from some prominent National Leaders" helped to create and reinforce the misimpression in the minds of potential clients that RLO had, in

fact, received endorsements from these public officials. Quotations from correspondence of public officials were taken out of context and, as used by RLO, strongly indicated, by implication, that such individuals intended to endorse RLO and its services.

Contrary to RLO's contention that there is no evidence that anyone thought that the presence of such material was or could be construed as an endorsement of RLO's services, the public officials themselves recognized the capacity to mislead inherent in such practice (Finding 182). Clients of RLO who testified in this proceeding stated that they were favorably impressed by the photographs and quotations of public officials in RLO's promotional brochures (Finding 183). Further, a review of the promotional brochures received in evidence clearly demonstrates the inherent capacity of this material to mislead potential RLO clients into the belief that such high public officials had endorsed or recommended RLO and its services (Finding 184).

The extensive use of prominent public officials' titles, names, photographs and letter quotations in advertising brochures was obviously intended by RLO to constitute endorsements of RLO and its services. This extensive use by RLO could have no other purpose than to favorably impress and influence potential clients to whom such brochures were sent. RLO's contention that these brochures were not intended as endorsements taxes credulity. The knowing use of such fabricated endorsements cannot be justified on any lawful basis. [134]

6. *RLO's Services Are of Little or No Value to Its Clients and The Retention of Money for Such Services Is an Unfair Act or Practice*

Paragraphs Twenty One and Twenty Two of the complaint allege that respondents' unfair or deceptive acts or practices have induced persons to pay over to respondents substantial sums of money for services of little or no value, and respondents have failed or refused to refund such sums. The retention of such sums of money is alleged to be a continuing unfair act or practice. Findings 185–216 present in detail facts establishing that RLO's services are of little or no value to its clients.

RLO's advertisements, brochures, letters, contracts, method of doing business, and the oral representations made by RLO employees, convey the definite impression to potential clients that the ideas or inventions accepted by RLO for "development" and "introduction to industry" are feasible and marketable and that there is a chance that the inventor, with RLO's assistance, will be successful (Findings

186-88, 190-91, 193). This is the total representation made by RLO to potential clients prior to the time clients sign the RLO development contract and agree to pay money for such services.

The most direct and meaningful evidence of the value of RLO's services to its clients is the amount of money earned by clients through the licensing of ideas or inventions handled by RLO. RLO has negotiated only eight (8) licenses for its clients during the period 1968 through 1976; four (4) of these licenses were for one invention. In 1976, RLO advised potential clients in the State of California, pursuant to a state statute, that only three (3) out of thirty thousand (30,000) clients of RLO had earned more money from their inventions than they had paid to RLO in fees (Finding 194).

RLO contends that there are an "unknown and untold number of successful arrangements entered into. . .by RLO clients without RLO's knowledge" (Finding 195). Support for this contention is based on general testimony of RLO officials. It is incredible to contend that any significant number of clients have successfully licensed inventions partially owned by RLO without RLO having some knowledge of this fact and participating in the rewards. [135]

Respondents made some contentions during the trial that clients were motivated not necessarily by money, but by matters of pride in obtaining a patent or in solving a problem. It is obvious, however, that the primary and overriding consideration of RLO clients was the desire to make money (Finding 194, footnote). RLO's advertising and promotional literature emphasize the monetary rewards which clients may expect; pride in self-accomplishment is not accentuated.

Not only has RLO's overall services been of little or no value to its clients, but an analysis of the individual services rendered by RLO reveals that nothing of value has been provided clients. The record indicates that the preliminary product research for which RLO charges $100 and up and for which RLO pays approximately $8, is inadequate as a patentability search (Findings 196-97). RLO does not furnish the client with a patentability report or evaluation and the patent attorney retained by RLO does not furnish a patentability report or evaluation. The client, according to RLO, is the person best qualified to make his own evaluation of patentability of his idea or invention. Further, the client receives no face-to-face consultation from the patent attorney retained by RLO. The first time an RLO client even knows the name of the patent attorney retained by RLO is when the client receives from RLO the patent application which is to be signed by the client and returned to RLO (Finding 199).

Some RLO clients receive patents on their ideas or inventions. However, the mere fact a patent issues is of little value. Many

patents that issue are commercially worthless, particularly because the subject matter covered by the patent specifications or claims is too narrow to provide any significant commercial protection. The fact that patent pending status has been obtained for clients and that actual patents have issued have had no appreciable effect on RLO's success in obtaining licenses for its clients. Therefore, the fact that patents issue to some RLO clients contributes little to the value of RLO's services to its clients (Finding 202). [136]

RLO does not give its clients' ideas or inventions any evaluation as to marketability (Finding 203). Without an adequate screening and evaluation process, little ultimate success can be anticipated for ideas or inventions handled by RLO. Placing every idea or invention presented to RLO through routine marketing procedures is of little or no value to clients; in fact, such marketing procedures actually may have an adverse impact on those clients' ideas or inventions which may have some merit. Professor Gerald G. Udell, Associate Professor of Marketing and Director of the Experimental Center for the Advancement of Inventions and Innovations at the University of Oregon, testified that placing in the channels of distribution unevaluated ideas is a highly ineffective approach to marketing:

> The problem is that if ideas are . . . put into the marketplace without a previous analysis or evaluation of the marketability of that idea, you have the problem that the channels become clogged with ideas that lack feasibility. This, then, in turn raises the search cost to the corporation, and you get static in the channels of distribution and it results in a highly ineffective approach to marketing the idea because of the cost involved in searching through all the ideas in order to find one good one. (Tr. 8349; see also, Finding 206).

The actual prospectuses which RLO mailed to corporations and organizations in an attempt to market its clients' inventions were severely criticized by marketing experts and new product managers who testified in this proceeding (Finding 207). Witnesses characterized the prospectuses as superficial and uninformative. The products identified in the prospectuses were criticized as "technically impractical, maybe even bordering on the stupid," obviously old ideas, silly and incomprehensible, "clearly ridiculous and unworthy of the dignity of a prospectus of any kind" (Findings 208, 210–11). Other criticism was directed at the "rote observations" and standard boiler-plate phrases used in all prospectuses, such as existing facilities can be utilized to minimize [137] tooling and production costs; materials may be varied to suit such facilities; standardization of components will minimize inventory costs; there is a growing demand for the product, or, the product fills a long-felt need (Finding 209). These statements in the prospectuses were termed by one

marketing expert as intellectually dishonest and unlikely to attract the interest of the marketplace (Lang, Tr. 3419–24).

Other witnesses criticized RLO's practice of mailing prospectuses to companies who had no interest in the particular products described in the prospectuses. An official of one company testified that only about one in fifteen prospectuses he received from RLO had any pertinence to his company's product line (Murphy, Tr. 384, 397J; see also Finding 212). Clients criticized the errors made by RLO in mailing prospectuses to companies no longer in business and the use of incorrect company addresses (Finding 215).

RLO contends its clients have a right to have access to the patent system and to industry (RRF, p. 9) and that RLO's services provide reasonable and economic access to this system (RPF, pp. 55–57; RRF, pp. 9–11). RLO's practice of accepting ideas or inventions for patenting and marketing without making any evaluation, and placing such ideas or inventions in the marketplace through standard marketing procedures, *may* be relatively inexpensive. The asserted reasonableness of the cost of RLO's services does not, however, atone for the lack of any value to clients.

The record in this proceeding demonstrates that RLO has induced potential clients by deceptive and misleading advertisements and representations to pay substantial sums of money to RLO in the expectation they will receive individualized and expert patenting, development and marketing services which will result in the successful marketing of their ideas or inventions to industry. The services clients receive are, in actuality, of little or no value to them. Further, the availability to the "system" which RLO purports to offer to its clients may have serious adverse affects on that system. Mr. Sears, a Patent Office official, testified that the Patent Office relies on the patent bar to discourage inventors whose ideas lack practicality: [138]

> Certainly , I would hope that patent attorneys and agents would discourage certain types of inventors where the invention, while perhaps useful in a marginal sense, new and unobvious, because nobody in his right mind would put it together — he would discourage that person from going ahead. (Tr. 1144; see also, Finding 206).

Contrary to RLO's contention that it makes the system available to the ordinary person, it is more probable that its business procedures are a detriment to its own clients and to many others who may have worthwhile ideas or inventions.

7. Responsibility of Individual Respondents Raymond Lee and Lawrence Peska for Challenged Acts and Practices of Corporate Respondent

(a). Raymond Lee and RLO

While denying any violations on the part of respondents, counsel for respondents RLO and Lee maintain that "[v]irtually all the dissatisfaction expressed by witnesses occurred several years ago, during which time Lawrence Peska . . . controlled nearly every facet of RLO's day-to-day operations" and "was the principal instrument in the formulation of RLO sales, marketing and service policies, its acts and practices" (RPF, p. 11). Counsel for respondents RLO and Lee also contend that, since Peska's employment terminated, substantial efforts have been made to revise RLO's policies and methods of doing business (RPF, p. 12).

Although evidence was received regarding RLO's current methods of hiring, training and monitoring Account Executives, recent revisions in these areas were not shown to have alleviated the deception and misrepresentation rampant at RLO prior to such changes (Findings 233–44). No evidence was offered that specific acts or practices challenged in the complaint have been eradicated nor would such evidence, if any existed, preclude the possibility that, absent an order, such acts and practices would not be resumed in the future. [139]

Counsel for respondents Lee and RLO, also argue that individual responsibility for RLO's acts and practices, if any exist, rests with Lawrence Peska rather than respondent Lee (RLO Ans. p. 4). This argument is without merit.

Throughout RLO's corporate existence, Lee has been its President and sole stockholder and director (Finding 3). From 1967 to 1972 Lee had primary responsibility for RLO's financial matters, engineering operations and general planning for the company (Lee, Tr. 444, 454). He was responsible for RLO's practice of taking a twenty percent (20%) interest in clients' inventions and for the inclusion of his professional education and background in RLO promotional literature (Lee, Tr. 5020; Peska, Tr. 7148–49). During Mr. Peska's tenure at RLO, respondent Lee had final approval on all RLO advertisements (Lee, Tr. 462–64, 5078; Peska, Tr. 4873–84, 4786, 4791, 7304, 7617, 7705). From 1973 to the present, Lee has had primary responsibility for RLO's overall engineering operations, marketing division and administrative operations (Lee, Tr. 445, 454, 4998, 5007; Dicks, Tr. 761).

By virtue of his positions of authority at RLO and the specific

business activities for which he has had responsibility, Lee has been and is directly responsible for formulating, directing and controlling the acts and practices of RLO challenged in this proceeding.

(b). Lawrence Peska

Counsel for respondent Peska maintains that no respondent violated Section 5 of the Federal Trade Commission Act, that Peska had no responsibility for the acts of other respondents, particularly after November 1972 and that, due to his disassociation from RLO, Peska will have no future effect on the acts and practices of RLO or Lee (Peska, PF, p. 5).

Peska's responsibility for formulating, directing and controlling the acts and practices of RLO challenged in this proceeding is detailed in Findings 220–25. Until November 1972, he, as RLO's Vice President, had extensive authority in the areas of sales, administrative management, advertising and directing the day-to-day operations of RLO (Finding 221). The practices implemented in these areas during his tenure have not been appreciably changed since 1972. [140]

Many of the practices Peska formulated at RLO were instituted at LPA after 1972, when this corporation became a competitor of RLO (Findings 226–27, 230–31). Peska has been and is the President and sole stockholder and director of LPA (Finding 226). Through LPA, Peska has continued the challenged acts and practices he was responsible for formulating, directing and controlling at RLO, and in which he participated while at RLO.

C. Legal Discussion

In this proceeding respondents' shrewd use of exaggeration, innuendo, ambiguity, half-truths, and omission of material facts has a substantial tendency and capacity to create a misleading impression in the minds of the ordinary purchaser concerning RLO's business and professional qualifications and the nature and value of its services. This misleading impression is heightened by respondents' method of operation in a technical area where little information is readily available to the public.

Respondents contend that their advertisements, brochures and contracts are clear, understandable and mean what they say. In evaluating respondents' advertisements, brochures, and contracts, it is necessary to consider the total impression created, not focus on isolated words or phrases. The important criterion is not what respondents say, but what the advertisements and contracts are

reasonably likely to represent to the public. *P. Lorillard Co.* v. *Federal Trade Commission,* 186 F.2d 52, 58, (4th Cir. 1950). In this regard, the Commission must look to the ignorant, the unthinking and credulous, rather than to the cautious and knowledgeable. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission,* 143 F.2d 676, 680 (2nd Cir. 1944); *Exposition Press, Inc.* v. *Federal Trade Commission,* 295 F.2d 869 (2nd Cir. 1961).

There is substantial testimony in this record that the public has been deceived by respondents' acts and practices. In addition to this testimony, the Commission can view respondents' advertisements, brochures, contracts, and method of operation and [141] draw its own conclusions as to the net impression likely to be created in the minds of the public. This authority has been repeatedly sanctioned over the years. *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 391-392 (1965); *Carter Products, Inc.* v. *Federal Trade Commission,* 323 F.2d 523, 528 (5th Cir. 1963); *Merck & Co.* v. *Federal Trade Commission,* 392 F.2d 921, 925 (6th Cir. 1968); *Kalwajtys* v. *Federal Trade Commission,* 237 F.2d 654, 656 (7th Cir. 1956); *Exposition Press, Inc.* v. *Federal Trade Commission, supra; Drew & Co.* v. *Federal Trade Commission,* 235 F.2d 735, 741 (2nd Cir. 1956).[18]

The statutory ban against false and misleading advertisements and representations applies to that which is suggested as well as that which is asserted. Where advertisements and representations convey more than one meaning, one of which is false, the respondent is liable for misleading variety. *Murray Space Shoe Corp.* v. *Federal Trade Commission,* 304 F.2d 270, 272 (2nd Cir. 1963); *Rhodes Pharmacal Co.* v. *Federal Trade Commission,* 208 F.2d 383, 387 (7th Cir. 1953). Actual deception need not be shown, a substantial tendency and capacity to deceive is all that is necessary to establish a violation of law. *Federal Trade Commission* v. *Colgate-Palmolive Co., supra,* at 391-392; *Feil* v. *Federal Trade Commission,* 285 F.2d 879 (9th Cir. 1960); *Charles of the Ritz, supra; U.S. Retail Credit Ass'n.* v. *Federal Trade Commission,* 300 F.2d 212, 221 (4th Cir. 1962).

It is firmly settled law that statements that contain less than the whole truth can be deceptive — "To tell less than the whole truth is a well known method of deception. . . ." *P. Lorillard Co.* v. *Federal Trade Commission, supra,* at 58; *Tashof* v. *Federal Trade Commission,* 437 F.2d 707, 714, fn. 37 (D.C. Cir. 1970). Further, if the first contact with a potential purchaser is deceptive, the fact that the truth may later be revealed will not remedy the initial wrong. *Carter Products, Inc.* v. *Federal Trade Commission,* 186 F.2d 821 (7th Cir.

[18] The administrative law judge likewise has this authority, subject to Commission review. *Walco Toy Company, Inc.* 83 F.T.C. 1783 (1974).

1951); *Montgomery Ward* v. *Federal Trade Commission,* 379 F.2d 666 (7th Cir. 1967). Also, the Commission repeatedly has [142] held that deceptive non-disclosure of material facts is a violation of Section 5. *Feil* v. *Federal Trade Commission, supra; All-State Industries of North Carolina, Inc.,* v. *Federal Trade Commission,* 423 F.2d 423 (4th Cir. 1970); *Tashof* v. *Federal Trade Commission, supra.*

The above parameters of the law governing false and misleading advertising and deceptive acts and practices make it evident that the total representation made to potential clients by respondents about their business and professional qualifications and the nature and value of their services is false, misleading and deceptive. Further, specific acts and practices of respondents are clearly within these established prohibitions.

The flagrant and extensive use of the titles, names, photographs and excerpts from letters of public figures in respondents' advertising, although accurately reproduced, creates the false implication that these public figures have endorsed respondents and their services. The use of the word *former,* preceding the professional qualifications of Respondent Lee, while true, can convey the understanding to some persons that Lee is a former government attorney. Absent a clear disclosure to the contrary, the implication remains that Lee is currently a private attorney and as such can prosecute patent applications.

Statements in respondents' contracts with clients concerning the evaluation of ideas or inventions and assurances of success are ambiguous and contradictory with other provisions of the same contracts and of other brochures and documents which are provided potential clients. Statements in respondents' development contracts that RLO will pay its proportionate share of government and other fees mutually agreed upon are unclear, ambiguous and contradictory to other provisions of the development contract which provide for a specific fee which includes the retention of a patent attorney to file a patent application.

In circumstances where respondents have used less than the full truth, where ambiguities and innuendoes are created, respondents are responsible for any misleading and deceptive impressions occasioned thereby. [143] An analysis of respondents' advertisements, brochures, and contracts, respondents' method of doing business, and the testimony of record leads to a logical conclusion that respondents' acts and practices have the tendency and capacity to deceive the public, and a substantial segment of the public has, in fact, been deceived.

Respondents RLO and Lee assert that, due to their questionable

motives and character, testimony of many of the witnesses called by complaint counsel should not be relied upon in reaching a decision in this matter. Respondents characterize the testimony of consumer witnesses as a recitation by "a few unhappy customers" about "limited elements" of "personal disappointment" with RLO and its services (RPF, p. 9; RRF, p. 3). Such unsatisfactory experiences are, according to respondents, aberrational and, for the most part, involve interactions with three Account Executives subsequently terminated by RLO (RRF, p. 50–61, 66). Testimony of former Account Executives is suspect, according to respondents, since these individuals include an admitted liar, a convicted felon[19], and persons currently in litigation with RLO (RPF, p. 4; RRF, pp. 3, 50–61).

Taking respondents' characterizations into account in evaluating the testimony of complaint counsel's witnesses, such characterizations do not preclude reliance on this testimony. The testimony of former Account Executives and RLO clients is consistent with the documentary evidence of record, the testimony of other witnesses, and respondents' entire course of business dealings as disclosed during this proceeding. To give weight to this testimony is, therefore, reasonable and proper.

Respondents RLO's and Lee's constitutional argument centers on the use of prominent public officials' names, titles, photographs and letter quotations in their promotional literature. Continually [144] maintaining that there has been no evidence submitted demonstrating a tendency or capacity to deceive or mislead members of the public into believing an enforsement of RLO or its services has been given by public officials whose names and quotations appear in RLO's advertisements, respondents assert that RLO's accurate statements and portrayals, whether consented to or not, are protected by the First Amendment of the United States Constitution (RPF, p. 13; RRF, pp. 48–52).

Respondents have erroneously sought to focus on whether prior consent to commercial use was obtained from the officials and the private right of action which may exist absent such consent. They maintain that inclusion of a challenge to such use in this proceeding constitutes a non-permissible governmental attempt to enforce a private right.

While cognizant that such a private right may exist, the thrust of the Commission's challenge to the use of public officials' names,

[19] The "admitted liar" fabricated educational background on his RLO employment application which was not checked by RLO or considered relevant to his sales function (Glass, Tr. 3898; Friedman, Tr. 6270). The "convicted felon" pleaded guilty to a violation of the U.S. Security and Exchange Laws; Lee and Si Friedman were informed and knew of this conviction during this Account Executive's tenure at RLO (Schwartz, Tr. 4065). These "character defects" were, apparently, matters of concern to RLO only during this litigation.

titles, photographs and letter quotations in this proceeding is the capacity of such use to mislead potential clients into the belief that such officials have endorsed RLO or its services.

Contemporaneous correspondence from and the testimony of the public officials, as well as testimony of clients of RLO and an examination of advertisements received in evidence, amply demonstrate the inherent capacity of RLO's advertisements to mislead potential clients into a belief that RLO or its services have been endorsed by the public officials whose photographs and quotations appear in such advertisements.

While certain forms of "commercial speech" do enjoy constitutional protection, this protection is not extended to deceptive or misleading advertising:

> . . .Untruthful speech, commercial or otherwise, has never been protected for its own sake. *Gertz* v. *Robert Welch, Inc.* 418 U.S. 323, 340 (1974); *Konigsberg* v. *State Bar,* 366 U.S. 36, 49 and n. 10 (1961). Obviously, much commercial speech is not provably false, or even wholly false, but only [145] deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.

Virginia State Board of Pharmacy v. *Virginia Consumer Council, Inc.,* 425 U.S. 747, 771-72 (1976); see also, *Bigelow* v. *Virginia,* 421 U.S. 809 (1975).

Given the misleading and deceptive character of RLO's advertising, as it relates to the use of public officials' names, photographs, titles and quotations, as well as other misrepresentations documented in the record, RLO can claim no constitutional protection for its dissemination.

Respondents RLO and Lee also contend that complaint counsel's unwarranted refusal to accept a consent order has forced them to continue with an "extraordinarily burdensome expensive proceeding" which, in essence, has constituted a deprivation of property without due process (RPF, p. 17). This contention is without merit. Respondents' "Motion To Settle Administrative Proceeding" filed November 15, 1976, which was opposed by complaint counsel, was considered by the undersigned and certified to the Commission, without recommendation, on December 3, 1976. The Commission thereafter determined there was not a liklihood of settlement and denied respondents' motion on December 14, 1976. Respondents have no constitutional right to settle this litigation, and certainly no such right to settle on their own terms.

Respondents RLO and Lee argue that the order, if any is to issue in this case, should not be applicable to respondent Raymond Lee,

individually. These respondents contend that responsibility for adoption and utilization of RLO's challenged acts and practices rests entirely with individual respondent Peska (RPF, pp. 11–12). Such respondents attempt the "oft-repeated effort to avoid responsibility for a violation of the statute by shifting it to another. These attempts are uniformly unsuccessful." *Colgate-Palmolive Co.*, 59 F.T.C. 1452, 1471 (1961), final order *aff'd, Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The record of this proceeding [146] offers no support for relieving respondent Lee of his individual liability for RLO's proven unlawful acts and practices.

Respondent Lee as the President, sole director and shareholder of RLO formulated many of the specific acts and practices challenged and, at all times, had the power to control, and did supervise all challenged acts and practices. Lee's direct participation in the activities of RLO and his positions of authority and control in the corporation provide abundant bases on which to find him individually liable for corporate respondents' unfair and deceptive acts and practices. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112 (1937); *Rayex Corporation*, v. *Federal Trade Commission*, 317 F.2d 290 (2d Cir. 1963); *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F.2d 7 (2d Cir. 1954).

Respondent Peska seeks to avoid individual liability by repeatedly disclaiming any responsibility, direct or deriviative, for RLO's acts and practices and asserting that, due to his total disassociation from corporate respondent RLO since November 1972, there is no substantial likelihood of his having any future effect on RLO's acts and practices (Peska, Ans. ¶1; Proposed Findings of Fact and Conclusions of Law submitted by Respondent Lawrence Peska Individually, p. 5; Motion and Affidavit of Respondent Peska filed November 4, 1975; Motion of Respondent Lawrence Peska for Summary Decision filed February 4, 1976). These arguments are meritless.

As the record amply demonstrates, respondent Peska, while Vice President of RLO, was instrumental in formulating, directing and controlling many of the acts and practices challenged in this proceeding. His subsequent dissassociation from RLO does not relieve him of his responsibility in this regard. The Federal Trade Commission has authority to bind individually former corporate officers who directed and controlled challenged acts and practices, if necessary to close off any wide "loophole" through which the order might be evaded. *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965); *Carpets "R" Us, Inc.*, 87 F.T.C. 303 (1976); *Coran Bros. Corp.*, 72 F.T.C. 1 (1967). Such a loophole exists.

Respondent Peska, since November 1972, [147] has been President, director and sole stockholder of LPA, a corporation offering services to inventors similar to those offered by RLO. The record emphasizes the need to bind Peska individually as many of the challenged acts and practices have, under the direction of Peska, been adopted and are currently employed by LPA.

D. The Remedy

It is well established that "the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices" and that, so long as the remedy selected has a "reasonable relation to the unlawful practices found to exist" the courts will not interfere. *Jacob Seigel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611 (1946); see also, *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 726 (1948); *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965); *L. G. Balfour Co.* v. *Federal Trade Commission,* 442 F.2d 1 (7th Cir. 1971). Having established a violation, the Commission must "be allowed effectively to close all roads to the prohibited goal, so that the order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952); see also, *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 431 (1957).

Although respondents RLO and Lee maintain that numerous changes in RLO's methods of operation make entry of an order unnecessary, their claimed discontinuance of unlawful acts and practices is not supported by the record. Even if record support existed for this position, an order would be proper since:

> [W]here an illegal trade practice is once proved against an enterprise, and is capable of being perpetuated or resumed, it may be presumed to have been continued, and an order may issue to prevent it, even upon a showing that it has been discontinued or abandoned.

P.F. Collier & Son Corp. v. *Federal Trade Commission,* 427 F.2d 261, 275 (6th Cir. 1970); see also, *Perma-Maid* v. *Federal Trade Commission,* 121 F.2d 282 (6th Cir. 1941). [148]

In fashioning an effective remedy in the instant case it is imperative, given the proven violations, that the order prevent all future misrepresentations and require respondents to fully advise clients of the actual services they will receive, the total costs they should anticipate for such services, and the real value (*i.e.,* respondents' "track record") of services to be rendered. If misrepresentations are prohibited and potential clients are aware of what they are to receive if they enter into a contract for respondents'

services, any decision to deal with respondents thereafter will be an informed one. Since the services offered by respondents are in a highly technical area, all disclosures required by the order must be adequate on all points and understandable.

Order provisions sought by complaint counsel regulating the fees respondents can charge, or *requiring* respondents to perform additional services, are not needed to correct the abuses found. The order must not be punitive, but must assure correction of those practices found to be unlawful and prevent their reoccurrence in the future.

The cease and desist provisions in the order issued herewith (Part I) are directed to specific violations of law which the evidence has revealed. The affirmative disclosure requirements (Part II through Part VI) are necessary to insure that potential clients are fully informed in the circumstances. The compliance provisions of the order (Part VII through Part IX) have been modified from those proposed by complaint counsel in light of respondents arguments (RRF, pp. 35–36). If any of these provisions prove unduly onerous, or if respondents change their business operations in the future, a petition to the Commission for modification is the most appropriate way to deal with such conjectures. *Encyclopedia Britannica, Inc.*, 87 F.T.C. 421, 528 fn. 20 (1976); *Federal Trade Commission* v. *Colgate-Palmolive Co., supra* at 394; *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F.2d 480, 487–488 (2d Cir. 1962).

Order provision Part I, Paragraph 7, prohibiting future misrepresentations of respondents' access or relationship to corporations or others seeking new [149] product ideas or inventions, while not reflective of a specific complaint allegation, is within the allegations of complaint Paragraphs Seven and Eight subparagraphs Five, and Paragraph Seventeen. The necessity of including this provision is also amply supported by the record. Respondents' promotional literature repeatedly represents directly and indirectly, an on-going relationship between respondents and corporations seeking new products which, allegedly, enhances respondents' ability to sell or license their clients' ideas or inventions (Findings 44, 46). In fact no such unique relationship has or does exist (Finding 48), nor are respondents successful in selling or licensing ideas or inventions to those corporations identified in their promotional literature (CX 3053 *in camera;* Stiegler, Tr. 6182, 6203).

Part II and Part III of the order provide for certain disclosures to be made in respondents' advertisements and promotional literature. These disclosures will provide potential clients with relevant information at the time of the initial contact, and the record

evidence reflects these disclosures are appropriate requirements in this proceeding.

Part V of the order requires respondents to provide purchasers with a time schedule within which services will be performed. While a violation of the statute was not proved in respect to delay, it is nevertheless appropriate to require respondents to provide a time schedule. Respondents sell services in an area where the public is basically without sophistication, and is not aware of normal time requirements for such services. The record reflects much client concern about delay in respondents' services, whether or not attributable to respondents. RLO recognizes the importance of this information to the public and has proposed such a time schedule and a customer reporting requirement as a basis for regulation of the invention service business (RRF, pp. 88–89). [150]

The order provisions, Part VI, Paragraphs One and Two, providing for a three day "cooling-off" period and a right to a full refund within ten (10) days of any money paid pursuant to such contract, are required to insure potential clients have adequate time to read and understand the disclosures respondents are required to make by virtue of this order. Given respondents' business methods, a potential client may initially visit respondents' offices, receive respondents' promotional literature and, during the same visit, enter a contract for the marketing of his idea or invention. Under these circumstances the disclosures required in respondents' promotional literature might be totally ineffective to fully apprise the potential client of the services he is to receive. Providing for a three-day period in which the purchaser may study respondents' promotional literature and the contract will insure that the required disclosures will be considered. Respondent RLO and Lee have also recognized the necessity for a provision of this type (RRF, p. 88).

Considering the entire record of this proceeding, the order entered hereinafter is necessary and appropriate to remedy the violations of law and to protect the public in the future. [151]

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the respondents and the subject matter of this proceeding.

2. Respondent, The Raymond Lee Organization, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 230 Park Ave., New York, New York. RLO's affiliated corporations are: Innovation Resources Corporation, Los Angeles, California; International Technology Transfer, Ltd.,

Ontario, Canada; Napatco, Inc., New York, New York; Raymond Lee Organization of Colorado, Inc., Denver, Colorado; Raymond Lee Organization of Texas, Inc., Houston, Texas; Republic Industries, Inc., New York, New York; National Patent and Trademark Company, Washington, D. C.

Individual respondent Raymond Lee is now, and has been since its formation, President and sole stockholder and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint.

Individual respondent Lawrence Peska is a former officer of the corporate respondent and, while an officer, directed, formulated and controlled the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint. Mr. Peska is now engaged in his own idea promotion business, Lawrence Peska Associates, Inc., with its principal office and place of business located at 500 Fifth Ave., New York, New York.

3. Through their various organizational divisions and wholly-owned subsidiaries, respondents are now, and for some time in the past, have been engaged in the advertising, solicitation, offering for sale, sale and distribution of services to inventors and prospective inventors and to other persons with ideas [152] for products in connection with the purported development, advice, and research for patent application, alleged introduction to industry and the purported marketing, sale or licensing of said inventions or ideas.

In the course and conduct of their business, respondents, their employees, agents or representatives, perform preliminary patent searches, prepare patent applications on inventions for submission to the United States Patent and Trademark Office and to foreign patent offices, and compile prospectuses and other documents for distribution to manufacturers and others.

4. In the course and conduct of their business, respondents have contracted to sell and have sold such services to purchasers located throughout the United States and have caused, and are now causing their services to be advertised, offered for sale and sold by means of newspaper and magazine advertisements, flyers, brochures and other printed literature of interstate circulation as well as by direct personal contact with potential purchasers by telephone and through letters, contracts, payments of monies and by other documents and instruments which have been transmitted by means of the United States mail, from respondents' principal place of business in New York State to such potential purchasers located throughout the United States. At all times relevant hereto,

respondents have maintained a substantial course of trade in the sale of respondents' services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business in the sale of services to inventors and to other persons with ideas for products is and has been substantial.

5. Respondents are now and at all times relevant hereto have been in substantial competition in or affecting commerce with other corporations, firms and individuals engaged in the advertising, offering for sale and sale of services of the same general kind and nature as those advertised, offered for sale and sold by respondents.

6. In the course and conduct of their business, and for the purpose of inducing the purchase of their services, respondents have made, and are now making, certain statements and representations in connection [153] with the advertising, offering for sale, sale and distribution of said services. By means of advertisements in various publications of general circulation, other advertising and promotional material, letters mailed to potential clients, contracts or oral or written sales presentations, respondents have made, and are now making statements and representations regarding respondents' business and professional qualifications and the nature and value of their services.

7. By and through the aforesaid statements and representations respondents have represented, and are now representing, directly or by implication, that:

(1) Respondent Raymond Lee is a registered patent attorney, a registered patent agent, or a licensed attorney.

(2) Respondents are qualified or recognized by the United States Patent and Trademark Office to prepare, file or prosecute applications for patents before said Office on behalf of their customers.

(3) Purchasers of respondents' services do not need to pay extra fees after they have entered into a contract with respondents.

(4) Respondents substantially develop or technically refine inventions or ideas for new products submitted to them by their customers.

(5) Respondents actively and successfully introduce, promote, and negotiate, on behalf of their customers, with manufacturers. [154]

(6) Respondents provide potential purchasers of their services with a fair, adequate and thorough appraisal of the patentability or the merit and marketability of their inventions or ideas for a new product, on which said potential purchasers can rely prior to contracting with respondents.

In truth and in fact:

(1) Respondent Raymond Lee is not a registered patent attorney, a registered patent agent, or a licensed attorney.

(2) Respondents are not qualified or recognized by the United States Patent and Trademark Office to prepare, file or prosecute applications for patents before said office.

(3) Purchasers of respondents' services may need to pay extra fees after they have entered into a contract with respondents.

(4) Respondents do not substantially develop or technically refine inventions or ideas for new products submitted to them by their customers.

(5) Respondents do not actively and successfully introduce, promote and negotiate, on behalf of their customers, with manufacturers.

(6) Respondents do not provide potential purchasers of their services with a fair, adequate and thorough appraisal of the patentability of their inventions or the merit and [155] marketability of their ideas for a new product, on which potential purchasers can rely, prior to contracting with respondents.

Therefore, the statements, representations, acts and practices set forth herein were, and are, false, misleading and deceptive.

8. Allegations that respondents failed to act without unnecessary delay in obtaining patent protection for customers, have not been proved by evidence of record in this proceeding.

9. In the further course and conduct of their business, respondents have failed to disclose to potential purchasers of their services the following material facts:

(1) That The Raymond Lee Organization, Inc., as the assignee of an interest in its clients' inventions, and in the absence of any agreement to the contrary, may as a joint owner of any resulting patents, make, use or sell the patented invention or license other persons or firms to make, use or sell the patented invention without obtaining the consent of and without accounting to respondents' clients.

10. Knowledge of such fact would be of importance to potential purchasers in their evaluation of the nature and value of the services offered by respondents. Thus, respondents have failed to disclose material fact, which if known to potential purchasers, would be likely to affect their consideration of whether or not to enter into a contract with respondents.

11. In the further course and conduct of their business, respondents have utilized in various brochures, flyers and in other advertising materials, the names, titles, photographs and quotations of prominent public figures, without their knowledge, consent or

authorization. In many such instances, general comments made by such persons in correspondence with respondents utilized in respondents' advertisements have misled potential purchasers of respondents' services into the erroneous and mistaken belief that the persons so named, pictured or quoted have endorsed or utilized respondents' services. [156]

12. The use of the names, photographs, official titles and quotations from correspondence of prominent public officials, major corporations and respondents' clients, was and is a deceptive and unfair act and practice which has misled potential clients into the purchase of respondents' services.

13. Respondents' aforesaid unfair or deceptive acts or practices have induced and are now inducing persons to pay over to respondents substantial sums of money for contracts whose value to the said persons for services by respondents was and is of little or no value. Respondents have received said sums and have failed to offer to refund, and refused to refund such money to such persons.

14. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts have had, and now have the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of, and payment for, respondents' services by reason of said erroneous and mistaken belief.

15. The aforesaid statements, representations, acts and practices of respondents were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

16. The order entered hereinafter is necessary to correct the unlawful conduct in which it has been concluded that respondents have been, and are, engaged, and to protect the public. [157]

ORDER

I

It is ordered, That The Raymond Lee Organization, Inc., a corporation, its successors and assigns, Raymond Lee, individually and as an officer of said corporation and Lawrence Peska, individually and as a former officer of said corporation, and respondents'

officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, with the exception of those offering patent and trademark services to professional attorneys and registered patent agents, in connection with the advertising, offering for sale or sale of services relating to the introduction, promotion, development, licensing, marketing or sale of ideas or inventions to industry, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, that any of respondents, or their officers, agents, representatives or employees, are registered patent attorneys or patent agents, or are [158] licensed, recognized or qualified to prepare, file, amend or prosecute patent applications before the United States Patent and Trademark Office, or before any patent offices located in foreign countries.

2. Representing, directly or indirectly, that respondents will develop or refine, or substantially develop or technically refine, inventions or ideas for new products submitted to them by their customers.

3. Representing, directly or indirectly, that respondents provide potential purchasers of their services with an appraisal of the patentability or the merit and marketability of their inventions or ideas for new products, on which said purchasers can rely.

4. Representing, directly or indirectly, that potential purchasers of respondents' services may or will receive a financial gain as a result of contracting with respondents. [159]

5. Representing, directly or indirectly, that any person, firm, organization or governmental agency or official has endorsed, used, or has used and been satisfied with respondents' services, unless such is a fact and such person, firm, organization or governmental agency or official has given prior written consent for such use.

6. Representing, directly or indirectly, the past earnings or success of any client unless such representations are representative of the typical experience of individuals contracting with respondents for the development and marketing of their inventions or ideas.

7. Representing, directly or indirectly, that corporations or other business organizations are seeking inventions, new products, or ideas for new products [160] through respondents, or that respondents have any special access to such corporations or other business organizations.

II

It is further ordered, That respondents shall:

1. Include in each printed advertisement the following notice conspicuously placed in print at least as large as the largest print in the advertising material other than respondents' name: *(name of respondent)* has assisted approximately *(number of clients)* during *(three preceding calendar years),* of which *(number of clients)* directly involved us in transactions in which they received, as a result of *(name of respondent)* services, an amount of money in excess of the fee they paid to *(name of respondent).*

2. Include in each advertisement broadcast by radio, or by television, the above-required notice, which [161] shall be read at the end of the advertisement at a rate of speed at least as slow as the slowest part of the advertisement.

3. Maintain for a period of three (3) years:

a) A copy of each advertisement, each radio script, and each television script and film published or disseminated,

b) Records disclosing the date or dates each such advertisement, script or film was published or disseminated, and,

c) The name and address of each publication or broadcast media disseminating each said advertisement, script or film. [162]

III

It is further ordered, That respondents shall disclose the following information in a clear and conspicuous manner in all promotional literature:

1. That respondents are not registered patent attorneys or patent agents, do not employ such attorneys or agents, and are not licensed, recognized or qualified to prepare, file, amend or prosecute patent applications before the United States Patent and Trademark Office or before any patent offices located in foreign countries.

2. The total number of persons who contracted with respondents for the purchase of respondents' services within the three (3) calendar years immediately preceding the year in which the promotional literature is utilized, the number of such persons whose inventions were sold or licensed to industry during said period of time, and the number who [163] received, as a result of respondents' services, an amount of money in excess of the fee paid to respondents.

IV

It is further ordered, That respondents shall:

1. Make the following disclosures on or with any contract to be executed by potential clients. Said disclosures shall be in print at least as conspicuous as other language in said contract, but in no case smaller than 12 point upper case type. The disclosures shall be in the following form set off from the text of the contract by a black border, or in a separate document attached to the contract, and immediately above the line for the potential clients' signatures: [164]

NOTICE

(a) *(name of respondent)* has assisted approximately *(number of clients)* during *(three preceding calendar years),* of which *(number of clients)* directly involved *(name of respondent)* in transactions in which they received, as a result of *(name of respondent)* services, an amount of money in excess of the fee paid to *(name of respondent).*

(b) UNLESS THERE IS SOME WRITTEN AGREEMENT TO THE CONTRARY, THE HOLDER OF ANY INTEREST IN A PATENT, NO MATTER HOW SMALL HIS INTEREST MAY BE, AS A JOINT OWNER OF ANY RESULTING PATENT, CAN, BY LAW, MAKE, USE OR SELL THE PATENTED INVENTION WITHOUT THE KNOWLEDGE OR CONSENT OF THE OTHER PARTY OR PARTIES IN INTEREST AND WITHOUT BEING ACCOUNTABLE FOR THE PROCEEDS DERIVED THEREFROM. [165]

(c) BY PROCEEDING WITHOUT THE ADVICE OF AN INDEPENDENT PATENT ATTORNEY YOU MAY LOSE ANY RIGHTS YOU MIGHT HAVE IN YOUR IDEA, INVENTION OR PRODUCT OR EXPOSE YOURSELF TO A COSTLY PATENT INFRINGEMENT LAWSUIT. YOU SHOULD AND ARE ENCOURAGED TO CONSULT AN INDEPENDENT PATENT ATTORNEY BEFORE YOU SIGN THIS AGREEMENT.

(d) The total fee you will be charged for the marketing of your idea or invention is *(dollar amount).* (Fees may be separately given for specific individual services that may be rendered, so long as a total figure for all services is disclosed).

I, *(Name of Customer),* hereby acknowledge receipt of a copy of this agreement on the date specified below.

Customer's Signature *Date*

[166] 2. At the time when the foregoing disclosures are made, respondents shall furnish each prospective purchaser of any of their services with a retainable duplicate copy of the disclosure document,

and secure from each such prospective purchaser a signed acknowledgement of the receipt thereof on the properly dated original copy. The document containing the disclosures shall be captioned "IMPORTANT INFORMATION," and shall not contain information or representations other than those set forth in Part IV, Paragraph 1 (a), (b), (c), and (d) above.

3. Respondents shall maintain, for a three (3) year period following the execution thereof, the originals of the signed acknowledgements of receipt of the disclosures described in Part IV, Paragraph 2, [167] and make them available for examination and copying by a duly authorized representative of the Federal Trade Commission, upon reasonable notice, during normal business hours.

V

It is further ordered, That respondents shall:

1. Disclose on any contract for services an approximate time schedule, based on past performance, during which such services will be rendered, specify any contingencies which may or will necessitate a modification of such schedule, and inform the client of his right to obtain a refund for failure to meet the time schedule, as modified, unless permission, in writing, is given by the purchaser.

2. Furnish to any purchaser of respondents' services a written report every three (3) months commencing six (6) months after [168] acceptance of the contract for services, indentifying the contract and including a description of the services performed to date and services yet to be performed relative to the contract. A final report shall be furnished the purchaser at the time all services have been completed.

VI

It is further ordered, That respondents:

1. Furnish a completed "NOTICE OF CANCELLATION" form, in duplicate, to each purchaser of respondents' services. Such form shall be attached to the contract and shall be easily detachable. The "Notice," in at least twelve point upper case type, shall state:

NOTICE OF CANCELLATION

(enter date of transaction)
(date)

[169] You may cancel this transaction, without any penalty or obligation, within 3 business days from the above date. Any money

you have paid pursuant to this transaction will be refunded to you within ten (10) days after receipt of this Notice.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to *(name of seller)* at *(address of seller's place of business)* not later than midnight of *(date)*

I hereby cancel this transaction. *(date)*

(buyer's signature)

2. Within ten (10) days after receipt of an executed "NOTICE OF CANCELLATION," refund to said purchaser all monies which have been paid to respondents pursuant to the cancelled transaction. [170]

VII

It is further ordered, That respondents shall:

1. Forthwith deliver a copy of this order, incorporating its provisions, to all present and future salespersons or other persons engaged in the sale of respondents' services and shall secure from each such salesperson or other person a signed statement acknowledging receipt of a copy of this order and their written agreement to adhere thereto.

2. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

3. Promptly notify the Commission of the discontinuance of any business, occupation or employment concerned with [171] the introduction, promotion, development, licensing, marketing, or sale of ideas or inventions and of the affiliation with any such new business, occupation or employment. Such notice shall include a description of respondents' ownership, duties and responsibilities in any such new business, occupation or employment.

VIII

It is further ordered, That nothing herein shall relieve respondents of any obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent with any provision of this order, respondents shall notify the Commission of such inconsistency and request advice as to compliance herewith.

IX

It is further ordered, That respondents shall, within sixty (60) days after entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

I. INTRODUCTION

On July 15, 1975, the Commission issued a complaint against respondents Raymond Lee Organization ("RLO"), Raymond Lee, the founder and chief officer of RLO and Lawrence Peska, a former officer of RLO[1] alleging violations of Section 5 of the Federal [2] Trade Commission Act (15 U.S.C. 45). The complaint challenges RLO's statements and representations regarding its business and professional qualifications, the services it offers to clients, and the value of such services.

With one exception, the administrative law judge ("ALJ") sustained the complaint allegations. On appeal, respondents vigorously challenge the ALJ's principal factual findings and legal conclusions, and raise constitutional issues with respect to the proceedings and the relief ordered by the law judge.

II. THE RAYMOND LEE ORGANIZATION

To provide some perspective for analyzing the practices challenged in this proceeding, a review of respondents' operations is in order. RLO is an idea and invention development company which offers patenting, developing, and marketing services to garage tinkerers and others who are convinced they have hit upon some imaginative idea for a new or improved product. The firm was founded in 1962 and operated as a sole proprietorship by Raymond Lee until its incorporation in 1967. (ID 5)[2] Initially comprising only Lee, Peska,

[1] Although the positions of corporate respondent RLO and individual respondent Lee are essentially identical, Peska raises different claims. He asserts first that he was not in a position of authority at RLO insofar as the challenged acts and practices were concerned, and second, that he left RLO before these practices occurred. These contentions will be treated separately below.

[2] The following abbreviations will be used in this opinion:

ID — Initial Decision finding number
ID p. — Initial Decision page number
Tr. — Transcript page number
CX — Complaint Counsel's exhibit number
RX — Respondents' exhibit number
RPX — Respondent Peska's exhibit number
RAB — Respondents' appeal brief

(Continued)

and two other employees (Tr. 7096), the firm by 1976 employed about 85 people (Tr. 459–61; CX 2790–93) with over 5,000 clients contracting for various services (ID 12, 16) and sales receipts exceeding one million dollars annually. (ID 23)

RLO relies heavily on advertising in newspapers, magazines, and the yellow pages of telephone directories to attract potential [3] clients. Among the major newspapers and magazines used by RLO are *Popular Mechanics, Mechanics Illustrated, Popular Science, Field and Stream, TV Guide, New York Times, Los Angeles Times,* and the *Chicago Tribune.* (ID 6) Advertisements typically stress that "manufacturers need new products," and urge those with an idea for a new product or a way to make an old product better to contact RLO, "the idea people." (CX 20, 26, 29, 31) Other advertisements focus on the services RLO offers: ideas and inventions will be expertly searched, and then developed for commercial appeal and sales to manufacturers. (CX 2a, 7, 16, 28) Many contain information on the background of the director, Raymond Lee. (CX 7, 24, 25, 40) Advertisements with a larger format frequently cite examples of alleged "Client Marketing Successes." (CX 24, 30)

RLO typically invites readers of its advertising to telephone or write "the idea people" for a variety of free brochures, with such titles as "Invention Record Form" (CX 2a, 7, 16, 20), "Directory of 500 Corporations Seeking New Products" (CX 7, 20, 25), "Recommended Protection Procedures" (CX 2a, 7, 25), "Product Marketing" (CX 3), "Inventions - Their Development, Protection & Marketing" (CX 20), and the "Inventors Information Kit." (CX 12, 24)

When potential clients contact RLO for further information they receive free Inventors Information Kits. (ID 29) Each kit consists of a cover folder and various brochures and flyers describing RLO's services.[3] Potential clients receive the kit regardless of whether they initiate contact with RLO by sending in a coupon clipped from an RLO advertisement, or whether they write, phone or drop by an RLO office. Although the brochures included in the kit have varied somewhat over the years, the materials usually include information on the background of Raymond Lee, general statements about the

CAB — Complaint Counsel's appeal brief
PAB — Respondent Peska's appeal brief
R.Ans — Respondents' answering brief
C.Ans — Complaint Counsel's answering brief
C.Ans P. — Complaint Counsel's answering brief to Peska
TROA — Transcript of Oral Argument before the Commission

[3] Brochures and other written material sent through the mail play a particularly significant role in RLO's sales. The entire course of dealing between RLO and many of its clients is through the mail and telephone conversations, since many clients never visit an RLO office. (ID 37) Most clients talk with account executives or other RLO personnel on the phone at some time during the course of their relationship with RLO, but most of their information about the company and its services comes through the mail.

firm's services, and endorsements from satisfied customers. Case histories of successful RLO clients are also typically included. [4]

The kit is accompanied by a letter addressed to "Dear Inventor." (CX 2604a) One version of this letter emphasizes RLO's "respected credentials," which are assurances of "integrity, experience, and ability to serve you well." The letter quotes an endorsement from an RLO client, an elected Texas county judge, who writes, "[i]t is my belief that if my product cannot be put on the market by The Raymond Lee Organization, it cannot be done." Another theme running through the introductory letter is that time is of the essence. The prospective client is warned that invention rights may be lost if prompt action is not taken.

The cover in which the brochures are placed contains photographs of RLO personnel, identified as members of the Administration, Engineering or Marketing Departments of the organization. (CX 49a, 49c) It is subtitled "Important Information Every Inventor Should Have For The Development, Protection & Marketing of Inventions & Ideas." Information is provided under headings such as "Who needs inventors?", "Why man invents," "Developing your idea," and "The next step." (CX 49b, 49c) The back of the folder tells the reader why RLO was established and describes the services provided by the firm. (CX 49d)

One brochure typically included in the kit, entitled "The Client and The Raymond Lee Organization," contains numerous representations about RLO's services. It states:

> You may contact an Account Executive . . . and immediately obtain information you require to initiate the development of a new product, idea or innovation. Seemingly difficult questions and methods of procedure are instantly simplified and stripped of the confusion and complexity ordinarily surrounding them.
>
> This efficiency, accuracy and simplicity requires knowledgeable, responsible, skillful people. We believe this characterizes the Raymond Lee Organization—the desire and ability to be of service. (CX 44e)

[5] The brochure further stresses the expertise of RLO's staff, noting:

> They [account executives] are well-educated, highly-trained in their respective fields and have learned their business well . . . . A large and able supporting organization has been built at Raymond Lee to serve your account executive . . . . It consists of New Product and Invention Researchers, Commercial and Mechanical Draftsmen, Technical Writers, Public Relations and Publicity Representatives, Advertising Specialists, Market Analysts, Library and Industrial Directory Researchers, Licensing and Sales Negotiators and an extensive group of International Associates . . . the men and women of the Raymond Lee Organization, representing years of seasoned experience have a fresh outlook on the potentialities for tomorrow. (CX 44g)

Another publication, "Ideas Go To Market . . . The RLO Way," relates client success stories. (CX 2604b) Foremost among these is the invention and licensing of the Royal Carousel fireplace, a staple in RLO promotional lore. This example, headlined "Fireplace Invention Brings Fame and Fortune to Idaho Inventor" refers to the more than $60,000 in royalties already received by the inventor, Harold Hannebaum, and contains Mr. Hannebaum's endorsement of RLO services.[4]

It should also be noted that in the bottom corner of the last page of this brochure, in relatively small type, there appear the following words of caution:

> It is generally known that relatively few of the new product ideas and inventions that are conceived by industry and individuals ultimately reach the market[6]place, or reap financial rewards for their creators. Therefore, case histories referred to by the Raymond Lee Organization should be considered not typical of all inventions submitted, but simply as examples of some areas of activity in which the company has had experience. (CX 2604b)

Finally, one other pamphlet typically included in the Inventors Information Kit is worth mentioning. (CX 2604c) This brochure is devoted to the "Tale of the Twist-Off - a Product Success Story" reprinted from Innovation World, an RLO publication in magazine format. The article relates how a "fledgling tinkerer and inventor" conceived the idea of a twist-off bottle cap in the 1920's. Although there was some initial success in marketing the product, "the whole rainbow melted, along with visions of the pot of gold," with the onset of the Depression.

In the late 1950's, with the aid of postwar developments in glass and metal technology, the White Cap Company invented the Twist-Off cap. The brochure states that the inventor who had received a patent in 1928 for a similar idea saw the Twist-Off cap made by White Cap and sought advice from Raymond Lee, then a patent attorney in Philadelphia. Although his earlier patents had expired, the inventor had evidence to support a claim of earlier use of the name "Twist-Off." According to the story, White Cap had been unaware of the earlier work on the bottle cap and the earlier use of the Twist-Off name, but Lee negotiated a settlement with White Cap for the inventor. This experience, so the article explains, prompted Lee to respond to the need for a complete service to protect and promote the interests of the small independent inventor. To this end,

[4] More general testimonials of satisfaction from some 20 RLO clients are set forth in a separate piece of promotional literature. (CX 2604g) Another brochure cites RLO's recognition by government and industry, prominently displaying a photograph of Raymond Lee receiving a certificate of commendation from John Lindsay, then mayor of New York City. (CX 2604d)

he resigned his Patent Office and bar affiliations to establish an organization for invention development and marketing.

The most important document in the Inventors Information Kit, according to RLO's "Dear Inventor" letter, is the Record of Invention form. (CX 2604i) The letter states that the inventor will immediately benefit in two ways by completing the form and returning it to RLO. First, the completed form will serve as documentary evidence of the date of priority for the invention, and second, the form will enable RLO to examine the invention and explain how it would like to proceed. (CX 2604a) The form also contains questions about the invention, which [7] the inventor is asked to answer, and space to provide a written description and sketch of the invention. (ID 33) If the recipient of an Inventors Information Kit fails to return the completed Record of Invention form, an RLO account executive may phone the potential client and urge a prompt response, stating that "time is of the essence." (ID 8)[5]

The return of the completed Record of Invention form to RLO marks the beginning of a client's relationship with the organization. When the form is received at RLO's offices, it is normally assigned to the account executive who handles the state in which the prospective client lives. (ID 8)[6] Out-of-town prospects are usually contacted by letter or telephone, while New York area residents are asked to visit RLO's offices to discuss the invention. (ID 39) [8]

Regardless of whether contact is by phone, letter or in person, the account executive's presentation is much the same. If the Record of Invention form has already been reviewed by the engineering department, the "Sales Procedure and Administration Manual" instructs the account executive to inform the prospective client of this fact and state that the salesperson would not have been authorized to discuss the matter further if the engineering staff had reason to believe that the invention could not be made or operated, or if it were contrary to accepted scientific principles. (CX 2604z–8) The account executive is further instructed by the manual to ask the inventor whether family and friends believe the idea is practical and

[5] RLO also uses a CALL-TELEGRAM to spur return of the Record of Invention. It states:

Many people prematurely underestimate the validity of their ideas. Please give me an immediate call—collect. I have three general questions that will help *you* determine the merit of your idea. (CX2913a) (emphasis original)

[6] Respondents challenge this finding on the ground that it is inconsistent with ID 93, which states that Record of Invention forms are apparently routed through the engineering department before going to account executives. An account executive testified that it is normal business procedure for the Record of Invention forms to be turned over to the account executives. (Tr. 1546) However, the manager of the New York region testified that the Record of Invention forms are routed through the engineering department before they are turned over to the account executives. (Tr. 1695) Although the record is unclear on this point, the inter-office routing of these forms is immaterial, since the engineering department does not provide any significant review of the forms. *See infra* at pp. 15, 19.

has good marketing potential. The salesperson typically states that RLO is interested in having a patent search done and that this is the first step in putting a product on the market. (Tr. 1529–30) The letter recommending preliminary product research assures customers that RLO has "an understanding of the objects and purposes of your invention" and urges that a patent search be conducted before further steps are taken to develop, manufacture, sell or license the invention. (ID 41)

The contract which the client enters into to have the patent search performed is called the "preliminary product research agreement." RLO offers three kinds of preliminary product research agreements ranging in cost from $100 to $300. (ID 10) The cost of a patent search using one researcher is at least $100. For prices ranging up to $300, the inventor can have the search performed by two or three researchers working independently.[7] RLO sold 3,819 preliminary product research agreements in 1974 and 4,938 in 1975. (ID 12) [9]

The agreement specifies that the client has no "expectations of a prior or subsequent evaluation of these proposals by [RLO] or its representatives," and that he or she is "requesting this research for the purpose of providing me with the benefit of personally comparing and evaluating my proposal/proposals with respect to such related U.S. patented inventions as may be located through such research." (CX 201) The agreement also promises that the client will receive copies of the patents that are located plus a statement of RLO's program for marketing an invention, subject to a disclaimer that such information should not be "construed as a recommendation based upon an evaluation of my proposal."

After completion of the patent search, any patents located are forwarded to the inventor with a letter which serves as both a sales presentation and the contract for RLO's development and marketing of the invention. The introductory paragraphs of the development contract warn of the hazards facing independent inventors and small businessmen, including the necessity to retain "engineers, lawyers, draftsmen, technical writers, patent attorneys, marketing organizations, and sales agencies, etc." (CX 100a) It explains that many "informed inventors" prefer to use an organization knowledgeable in the development and introduction of inventions to industry. The contract further recites that as invention developers, RLO has assembled a staff and retains independent contractors for carrying

[7] The record is unclear on the exact cost for each type of search. One former account executive testified that he sold mostly the $100 agreements, while Lee testified that the cost of a single search program was $135–$165. (Tr. 1510, 4987) One RLO document states that preliminary product research agreements are available for a fee ranging from $100 to $300. (CX 2600B) The record contains several agreements for a fee of $100 (CX 201, 367d) and an agreement for an extended search using two researchers for $175. (CX 204)

out many of the important steps for introducing an invention to industry. (CX 100a)

Finally, the contract informs the customer that RLO will proceed with the immediate development of the invention in exchange for an assignment of an interest (generally 20 percent) in the invention plus a fee, which ranges from $775 to $2,000. (ID 13)[8] RLO sold 1,498 development contracts in 1974, and 1,585 in 1975. (ID 16) [10]

As its part of the bargain, RLO sets forth in the contract what steps it will take to assist the inventor. (CX 100a) First, RLO will "technically develop and/or refine, if and to the extent necessary, for the preparation of suitable illustrations and description of the commercial features you regard most important." Second, RLO will retain a registered patent attorney or agent to prepare an application for a patent, and will pay its proportionate share of government fees. Third, after patent pending status is achieved, RLO will prepare and print a sales letter and prospectus on the invention. Fourth, RLO will introduce the invention to industry by contacting a substantial number of prospective manufacturers who have notified RLO of their interest in acquiring new products. Next, RLO will establish a campaign to publicize the invention for the purpose of stimulating commercial interest. Finally, RLO will actively negotiate with manufacturers expressing an interest in acquiring rights to the invention.

The development contract further specifies that the inventor will have the option for six months after the agreement to repurchase for $1,000 RLO's interest in the venture. It also warns that time is often an extremely important factor and that important invention rights are sometimes lost because of unnecessary delay. (CX 100b)

In addition to the basic development contract, RLO offers Canadian and Swiss patent and marketing programs. The cost of the Canadian program ranges from approximately $500 to $1,000 plus assignment of a 20 percent interest in the invention to RLO. (CX 2600b) Approximately 10 to 15 percent of clients who contract for the development program also purchase the Canadian program. (ID 17) The record does not reflect how many clients purchased the Swiss program.

Potential clients who decline to enter into either a preliminary

[8] California law requires invention developers to disclose certain facts and figures about their business practices to potential California clients. (Cal. Bus. & Prof. Code, Chapter 17, § 22370, Division 8) Pursuant to this statute, RLO lists fees for particular programs, including $1,000–$2,000 for development contracts. Respondents contend that the ALJ should not have based findings on the California disclosure statement because RLO, forced to estimate and disclose fees by the statute, chose to state a very high range of fees. (RAB at 25) We are not persuaded by this contention. We see no reason why consumers and the Commission should not be entitled to rely upon the truthfulness of statements made pursuant to state law. Of course, for purposes of the issues at stake here, even the lower figure of $775, contained in some of RLO's development contracts (CX 100a), is substantial.

product research agreement or the development contract, or who already have filed patent applications, are offered a marketing program to introduce the product to industry. (Tr. 1541–42, 778, 802–03, 825–26) Also known as the commission sales agreement, this program resembles the development contract except that no patent application is filed and there is no assignment to RLO of an interest in the invention. The fee for this service ranges from $400–$600, plus 20 percent of any proceeds from the sale or licensing of the idea. (ID 15) There is also a program for $85 which simply involves preparation and mailing of a prospectus to approximately 100 firms that might be interested in the purchase or licensing of the invention. (Tr. 1916–19) [11]

III. RLO Representations

The complaint alleges that respondents engaged in a wide variety of misrepresentations. Amidst these charges are three which strike at the heart of RLO's method of doing business and are central to the issues in this case. First, it is asserted that RLO falsely claims to provide purchasers with fair appraisals of the patentability or marketability of their inventions. Second, the complaint charges that respondents failed to substantially develop or technically refine clients' ideas as promised. Third, according to the complaint, RLO deceptively represents that it actively and successfully introduces, promotes, and negotiates with manufacturers for the sale or licensing of clients' inventions.

Other allegedly false claims challenged by the complaint include representations that no additional fees, apart from those set forth in the development contract, will be required to obtain a patent or market an invention; that RLO will perform its services in a timely manner; and that public officials have endorsed or utilized respondents services. In addition, the complaint also charges respondents with failing to disclose that as joint owners of a patented invention they may use or sell it without the clients' consent and that respondents are not qualified to file patent applications. These allegations will be discussed in order.

A. *Claims that RLO Evaluates Inventions*

Although RLO does not specifically state that it will evaluate the patentability and marketability of an idea, there is little question that the firm's promotional literature and its entire course of dealing leave clients with the impression that RLO will objectively assess their ideas before advising whether to pursue the patenting and

marketing of an invention. The fact that respondents do not state in so many words "We Evaluate Inventions" is, of course, of little significance, since the Commission is not confined to analyzing isolated words and phrases in determining what representations are being made and whether those representations are false, deceptive or misleading. Instead the Commission may look to the total impression created by words in their context. *See Beneficial Corp.* v. *FTC,* 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied,* 430 U.S. 983 (1977); *Continental Wax Corp.* v. *FTC,* 330 F.2d 475, 477 (2d Cir. 1964); *National Bakers Services, Inc.* v. *FTC,* 329 F.2d 365, 367 (7th Cir. 1964); *P. Lorillard Co.* v. *FTC,* 186 F.2d 52, 58 (4th Cir. 1950); *Charles of the Ritz Distrib. Corp.* v. *FTC,* 143 F.2d 676, 679 (2d Cir. 1944). Although our task would no doubt be simpli[12]fied if firms would always state their claims clearly and forthrightly, experience teaches that representations which violate Section 5 are often found not in bold assertions but in exaggeration, innuendo, ambiguity, half-truths, and the omission of material facts.[9] Here the evidence establishes that RLO's promotional material and its account executives leave prospective clients with the net impression that respondents will examine an idea or invention and provide a fair and thorough appraisal of its potential for being patented and marketed.

This impression is fostered from the very beginning of a client's contact with RLO. One advertisement exhorts inventors to write for the free Inventors Information Kit which tells how inventions may be "protected, evaluated, developed and negotiated for cash sale or royalty licensing." (CX 24) Another assures the inventor that ideas will be "*honestly* and *sympathetically* handled . . . . Then we examine your work. Make suggestions. Help with research . . . ." (CX 12) (emphasis original)

The folio cover of the Inventors Information Kit elaborates on this theme by stating that an RLO account executive, described as "well-educated and highly trained and now a full-time career man in the new-product technology field," will "study your idea honestly and sympathetically without cost or obligation and depending upon its status, suggest a procedure for commencing its development or commercialization." (CX 49c)

RLO frequently implies that it is selective (and hence performs some evaluation) in accepting new ideas for development and marketing. (ID 59) For example, one advertisement states, "If your invention is acceptable, we'll develop it for commercial appeal,

[9] *See. Regina Corp.* v. *FTC,* 322 F.2d 765, 768 (3d Cir. 1963); *Feil* v. *FTC,* 285 F.2d 879, 896, (9th Cir. 1960), quoting Handler, *The Control of False Advertising Under the Wheeler-Lea Act,* 6 Law and Contemp. Prob. 91, 99-100 (1939).

negotiate for Cash Sale or Royalty Licensing." (CX 19) The cover of the Inventors Information Kit informs prospects, "[h]owever, if we cannot accept your invention or idea for processing, we will promptly inform you of the reason." (CX 49c) The "Dear Inventor" letter which typically accompanies the Inventors Information Kit contains a nearly identical sentence. (CX 51) This letter also states that the completed Record of Invention form will enable RLO to "examine the invention." (CX 51) A different version of the "Dear Inventor" letter contains similar representations that RLO will "review" and "examine" the invention. (CX 50) [13]

The Record of Invention form which is included in the Inventors Information Kit states that RLO is being authorized to examine the invention "for the purpose of receiving its comments and suggestions for the international development and introduction of this invention to industry." (CX 52) A follow-up letter to potential clients acknowledging receipt of the form states that RLO has "completed our examination of it" and goes on to suggest that preliminary product research be conducted. (CX 96a)

The impression that RLO will fairly evaluate ideas submitted to it is reinforced by account executives in selling preliminary product research agreements and development contracts. One former account executive testified that he told potential purchasers of a research agreement that "our people think that the idea is feasible and marketable." (Tr. 4202) Another testified that he was instructed to tell clients that their ideas were marketable and that RLO would not have sent a marketing proposal if it had not intended to make money on its 20 percent interest in the invention. (ID 67) The record is clear that clients were left with the impression that RLO would evaluate their ideas or inventions to assess the chances for obtaining a patent and achieving commercial success.[10] (ID 74–81) As one client stated:

> [W]e both agreed yes, we have a good thing here. Otherwise I would have never followed through on this thing. I am not qualified to make decisions to continue with patent applications, that's why I hired somebody else. (Tr. 8265)

In denying that they make such claims, respondents argue that their research agreements and development contracts clearly alert clients to the fact that they must make their own evaluation of the prospects for their ideas and inventions. To support their contentions, respondents point to language in the research agreement that

[10] It is well-settled that the Commission has the expertise to determine whether advertisements have the capacity to deceive or mislead the public. Consumer testimony, although not essential, is sometimes helpful. *See FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 391–92 (1965); *Resort Car Rental System, Inc.* v. *FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

information provided by RLO is for the client's "personal knowledge and evaluation." (CX 201) There is also language in the development contract which informs the inventor that the results of the product research are being forwarded to "aid you in your evaluation" of the idea. (CX 840a) [14]

We do not believe, however, that either of these documents is clear on its face as to what RLO does or does not promise. Moreover, neither document is likely to dispel the notion implanted by representations made in advertisements, brochures and conversations with account executives that RLO provides clients with an objective appraisal of an invention's merits. The patent search and development contracts are far more ambiguous in defining the scope of RLO's contractual obligations than respondents would have us believe. For example, the preliminary product research agreement details six separate steps which RLO promises to undertake, including examination of the proposal, classification of the subject matter and field of investigation, research of relevant patent records, and presentation of research results. (CX 201) It is not unreasonable to conclude that a purchaser, particularly one unsophisticated in the ways of patent law, would assume he or she would be getting more from RLO than copies of some patents, notwithstanding the firm's disclaimer about providing a legal opinion on patentability.

Similarly, at the more critical and costly juncture of deciding whether to enter into a development contract, a prospective client is presented with contract terms that reinforce the impression that RLO has the capacity and the incentive to evaluate his or her idea. The development contract emphasizes RLO's knowledge and experience in handling the diversified array of hurdles facing an independent inventor. After describing the advantages of using RLO's services, the contract proposes that for an assignment of a 20 percent interest in the invention, plus a stated fee, RLO will develop and promote the product. We agree with the law judge that it is reasonable to construe this offer as implying that RLO has evaluated the idea, thinks it has merit, and is willing to share the risk of development by taking an interest in the invention as partial compensation for its services. (ID 65) In the words of one client, "I understood that anybody that wants to get 20 percent in my idea must think it was a pretty good idea." (Tr. 4369; *see also* Tr. 3099–3100)

More importantly, the contract disclaimers relied upon by respondents are insufficent to counter the overall impression fostered by RLO's written and oral representations that it provides clients with a fair and thorough appraisal of their ideas. If an initial

contact with a purchaser is deceptive, the fact that the truth may be subsequently revealed will not necessarily eliminate the initial wrong. *See Resort Car Rental System, Inc.* v. *FTC, supra,* 518 F.2d at 964; *Exposition Press, Inc.* v. *FTC,* 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied,* 370 U.S. 917 (1962); *Carter Products, Inc.* v. *FTC,* 186 F.2d 821, 824 (7th Cir. 1951). Furthermore, if a representation is capable of being interpreted in a misleading way, it should be construed against the advertiser. *See Simeon Management Corp.* v. *FTC,* 579 [15] F.2d 1137, 1146 (9th Cir. 1978); *Resort Car Rental System, Inc.* v. *FTC, supra,* 518 F.2d at 964. Here, respondents cannot rely on ambiguous language to dispel the impression left by repeated prior misrepresentations.

That RLO does not evaluate or appraise inventions is not only conceded by respondents (RAB at 30, 33) but is clear from an examination of their practices. The firm's Sales and Administration Manual shows that only minimal standards are employed by RLO in determining whether proposals should be accepted. (CX 2602f) Not surprisingly, inventions which are contrary to accepted scientific principles, including perpetual motion machines and anti-gravity devices, are rejected. RLO also rejects ideas which purport to offer cures for disease or for regenerating human tissue including cancer cures, hair growers, and bust developers. It turns down ideas for methods of doing business, conducting various transactions or merchandising techniques. Printed matter that does not involve a particular method, process, formula or mechanism is also rejected. Finally, the Manual instructs that in addition to these categories of unacceptable items, "[a]ny item of questionable content should be held subject to verification of acceptability." *Id.*

The manager of RLO's Engineering Department, Philip Dicks, testified that RLO also rejects ideas for changes in the material or size of a product already on the market. (Tr. 4741) Si Friedman, supervisor of account executives, testified that items that verge on the obscene are not accepted. (Tr. 6287) Former account executive William Coyle stated that "anything that was obscene or very far out would be rejected, but it would have to be pretty bad." (Tr. 1524–25)

Apart from these rather obvious exceptions, RLO made no attempt to evaluate the commercial merit or the patent potential of ideas and inventions. Account executives are discouraged from evaluating the merit of ideas, and the engineering department does not consider marketing potential in reviewing Record of Invention forms. (Tr. 1680; ID 93–95) Respondents admit that they are not qualified to advise or appraise with respect to patentability (RAB at 32; Tr. 797–801); and the patent attorneys who are retained by RLO to file patent

applications do not evaluate an invention before filing the patent application. (Tr. 797–801, 1023–24) Quite simply, RLO's policy is to sell a patent search and a development contract on virtually all ideas which clients bring in. (ID 93–95) In short, RLO does not deliver what it promises. [16]

B. *Claims That RLO Will Substantially Develop and Refine Inventions*

The complaint alleges, and the ALJ found, that RLO represents that it will substantially develop or technically refine inventions or ideas submitted to it, but that the firm fails to do so in a significant number of instances. Respondents argue that their claims are carefully couched, citing language in the development contract which states that RLO, in carrying out its part of the bargain, will "technically develop and/or refine your invention, if and to the extent necessary, for the preparation of suitable illustrations and description of the commercial features you regard most important." (CX 100a) Thus, respondents contend, the limited nature of its development service is clearly revealed to potential customers.

Although RLO does not explicitly state that it substantially develops ideas or inventions, we find that its claims clearly imply as much. Once again the representations are made with subtlety and depend on the effective use of innuendo, ambiguity, and half-truths. *See Regina Corp.* v. *FTC, supra,* 322 F.2d at 768; *Feil* v. *FTC, supra,* 285 F.2d at 896. We believe it would be unlikely for a potential client to read RLO's advertisements and brochures and come away with the understanding that the frequent references to "develop" and "refine" simply mean preparation of drawings and written descriptions. To illustrate, one brochure contains a section on invention development which emphasizes that:

> Invention development is one of the most helpful and valuable services available through the Raymond Lee Organization, Inc. Here the objective of the company is to place the invention or new product idea in a suitable form for presentation to industry. Such a program should include preparation of necessary illustrations and written description of the features considered to be most important and valuable for the manufacture and marketing of the concept . . . (CX 44j)[11]

The clear implication is that preparation of illustrations and written descriptions is but one phase of an invention development program, not that it is the whole development program. [17] Numerous other references in RLO's promotional materials also suggest that

[11] Other advertisements and brochures indicate that ideas will be "developed for commercial appeal and cash/royalty sales to manufacturers" (CX 2a, 7, 25), or "[w]e will develop your idea, introduce it to industry, negotiate for a cash sale or royalty licensing." (CX 20, 26, 33).

preparation of illustrations and written descriptions is something separate from invention development, or imply that these services constitute just one phase of invention development. (ID 112–17, 119)

Whether a would-be inventor goes to RLO with a well-defined invention, perhaps even with a working model, or simply has an idea that seems promising, RLO's representations strongly suggest that it will provide whatever services are necessary to turn the idea into reality. This theme pervades RLO's promotional literature. For example, a letter sent to clients in the Inventors Information Kit states:

> All services, from the initial examination of the invention, to product research, technical development, the preparation of drawings and promotional material and negotiations with industry are performed by persons experienced in their respective fields. (CX 50)

Another brochure claims an invention developer technically develops and refines an invention, but "serves another function, too. He usually takes into consideration such factors as industrial preferences, manufacturers' requirements and consumer appeal." (CX 53d) This publication also states, in advising whether an attorney or an invention developer would be more useful to the independent inventor, that "[i]f the service required is of a technical nature, where a background in design development, manufacturing techniques and sales promotion are [sic] important, the Invention Developer would be more helpful." (*Id.; see also* CX 54d, 55d) Yet another brochure in the Inventors Information Kit represents that RLO will "help develop a comprehensive individualized program for you that is sound and sensible—tailored to the specific needs of your invention." (CX 68a) Similar representations occur frequently in RLO's promotional material. (CX 49d, 96, 174)

Indeed, in contrast to the language relied upon by respondents, other portions of the development contract suggest that development of an idea means more than the preparation of illustrations. Specifically, the second paragraph notes that "inventions to be offered to industry for sale or licensing first require certain technical development, refinement, and safeguards, *as well as* preparation of important presentation material." (CX 100) (emphasis added)

The contract then describes how RLO provides a comprehensive service for inventors, thereby making it unnecessary to retain engineers, lawyers, draftsmen, technical writers, patent attorneys, marketing organizations, and sales agencies. The contract language, when viewed in its entirety is at best ambiguous, and it is reasonable

for customers to conclude that it promises more than respondents claim it does. [18]

Consumer testimony indicates that clients in fact believed RLO would make substantial contributions to the development of their ideas. Dr. Alberto Giaquinto, who came to RLO with an idea for an automobile ignition system based on fingerprints, testified that as a result of RLO advertising he believed:

> They would develop your idea from the beginning to the end and that you did not have to be a scientist or engineer, that they had a staff of people that would develop and present your idea to industry. That's what I thought, they would present my idea, which is all I had, an idea. (Tr. 4495–96)

Dr. Giaquinto added, "[s]o I assumed they were going to take it all the way from my idea to a finalized blueprint that an engineer could actually read and make a working model of." (Tr. 4500) Other clients testified that "this company took care of everything it seemed" (Tr. 3141), that RLO offered a "package deal" (Tr. 3152), and that they took care of "the whole thing." (Tr. 2121)

Despite representations about RLO's extensive and experienced staff of experts, including "New Product and Invention Researchers, Commercial and Mechanical Draftsmen [and] Technical Writers" (CX 44g), the record establishes that RLO does little or nothing with clients' ideas and inventions except prepare drawings to accompany patent applications. Representatives of RLO, including respondent Lee, testified that the firm was primarily concerned with the preparation of illustrations, with embellishments considered at various stages of preparation. (Tr. 4726, 5065–68) For those who come to RLO with only an idea for a new product, RLO does little more than describe that idea visually and verbally on paper. The firm does not perform independent research or tests of clients' ideas or inventions. (ID 106) It does not routinely prepare working models of ideas or inventions;[12] nor does it test products to see if and how well they work or how they might be improved. Moreover, RLO does [19] not advise on materials to be used or conduct research about what changes or features might make an item more marketable. (ID 106)

Accordingly, we find that, contrary to its representations, RLO does not substantially develop or technically refine ideas or inventions submitted to it.[13]

[12] The record reflects the unhappy experience of RLO client Allen Guerard who ordered a model of his invention, a device to hold ketchup bottles together so that the leftover ketchup in one bottle would drain into the other. Guerard ordered a model of his idea from RLO at a cost of $517.50, which was in addition to the $1,072.50 already paid to RLO and other fees paid to the patent attorney. A satisfactory working model was never built but we take no position on whether this was because the model was deficient, or because the idea itself was inherently flawed. (Tr. 3185–871, 7740–48)

[13] In so concluding, we do not rely on the ALJ's assumption that any modifications suggested by RLO are

(Continued)

C. *Claims That RLO Actively and Successfully Introduces and Promotes Inventions*

The law judge found that, as the complaint alleges, RLO falsely represents that it actively and successfully introduces and promotes its clients' ideas and inventions to industry. (ID 58) We affirm.

RLO argues that its promotional material does not refer to or imply special access by RLO to corporations (ID 44), and that many corporations do seek new products through RLO. (RAB at 27) The first contention is without merit. RLO hints time and again in its promotional material that it has been retained by corporations seeking new product ideas. A detailed brochure, "The Client and The Raymond Lee Organization," lists one of RLO's activities as "actively seeking new products *on behalf of* major corporations and assisting in the manufacture and marketing of new product concepts." (CX 44e) (emphasis added) [20] Under the heading, "Introductions to Industry," the brochure says that RLO is in "continuous contact with leading companies in the U.S. and abroad" and claims the organization is in a position to "introduce virtually any new product, idea or concept to selected companies." (CX 44-o) The brochure also refers to these companies as "our clients," implying that RLO is paid by these corporations to search for new product ideas. (CX 44q)[14]

Another publication cited by the ALJ (ID 48), entitled "The Raymond Lee Organization Internationally Known," reproduces letters from corporations and clients, as well as awards and citations. (CX 80) The brochure's cover is a montage of letterheads from such diverse groups as General Motors, Lockheed, the Indiana State Bar Association, Massachusetts Institute of Technology, The Austrian Trade Delegate to the United States, and the Federal Trade Commission. Respondent Lee testified that the montage was used to "graphically illustrate the fact that [RLO was] known internationally amongst various types of organizations." (Tr. 5098) While it is certainly true that RLO was known to the Federal Trade Commission, we believe that this misuse of the Commission's name is a classic case of deception resulting from omission of a material fact; namely, the nature of the Commission's interest in RLO. The record does not reflect why and in what context the other organizations listed had occasion to know of RLO. This particularly blatant bit of deception and the excuses offered for it by respondents are indicative

relatively trivial because RLO does not profess to be a co-inventor of its clients' inventions. (ID 122, 123) RLO could make substantial and significant contributions to the development of an invention and still not be required to file as a co-inventor under 35 U.S.C. 116. *See Hobbs* v. *United States Atomic Energy Commission*, 451 F.2d 849, 864-65 (5th Cir. 1971); *P&D Sales & Mfg. Co.* v. *Winter*, 334 F.2d 830, 836 (7th Cir. 1964).

[14] One additional brochure typically included in the Inventors Information Kit is entitled "500 Corporations Seek New Products Through The Raymond Lee Organization." (CX 78)

of the extent to which RLO was willing to use deceptive and misleading representations to create a favorable image of the company's record and reputation. [21]

It is clear that RLO enjoys no special relationship with corporations, nor does it have numerous corporate clients who retain it to seek out new product ideas. What it does have is a list of manufacturers who have indicated they would like to receive announcements of new inventions in their product lines. (RX 671-709) These manufacturers were initially contacted by RLO and asked if they wanted to receive free prospectuses on inventions and the free RLO publications "New Product Bank" and "Innovation World." Quite naturally, these firms were not unwilling to receive new ideas and, according to an RLO representative, some 2,500 replies were received. (Tr. 7801-04)

In attempting to market a client's invention, RLO mails prospectuses to a "substantial number" of companies on its list that conceivably might be interested in the product. (Tr. 7797-804) No other direct contacts are made, except to respond to the few requests it gets for more detailed information. The record contains some conflicting evidence as to how accurately the announcements are targeted to firms with related product lines. Although several witnesses from manufacturing firms testified that the prospectuses they received from RLO were within their product lines (Tr. 5907, 7329), other evidence indicates that the mailing system was hit or miss, and that RLO inundated companies with ideas that were totally unrelated to their product lines. (Tr. 398j, 1221, 3195-96, 1929-35) But even assuming that RLO competently compiles lists and sends invention announcements to manufacturers in relevant product areas, this activity does not comport with the representations made by RLO. In particular, the phrases "on behalf of major corporations," "maintain continuous contact with leading companies . . . on a regular basis," "[RLO] is in a position to introduce virtually any new product ideas . . . to selected companies" and "we can supplement our clients' search for new product ideas" imply that inventors will get more for their money than a mass mailing. (CX 44-46, 67, 75, 78)

The prospectuses that are sent to manufacturers on the mailing list contain a brief description of the invention followed in virtually all instances by nearly identical boilerplate paragraphs asserting that "there is a growing demand for a product of this type" and that the product "fills a long-felt need in a convenient, effective manner and at a cost within the budget of the ultimate user." Each prospectus also claims that "[e]xisting facilities may be utilized to

minimize tooling and production costs" and that "[s]tandardization of components will minimize inventory costs." (CX 2657a-b - CX 2697a-b) [22]

RLO contends that its promotional program includes more than the introduction of inventions to industry through mass mailings. It also includes a follow-up program and publicity for clients' inventions. (RAB at 29) The effort to obtain publicity for clients' inventions, which RLO lists as part of its promotional campaign, consists of boilerplate press releases sent to newspapers near inventors' hometowns. A press release typically includes a paragraph or two about the invention followed by equal space devoted to RLO and its business. (CX 1110, 1571a) Although the press releases occasionally succeed in sparking some local publicity for an inventor (CX 1115, RX 116), they are of little benefit in promoting the invention to prospective manufacturers. These efforts do not reflect the kind of thorough, aggressive marketing plan that respondents purport to provide to their customers.

The complaint also alleges that RLO represents it will successfully introduce and promote the inventions of its clients. RLO does not take issue with this allegation[15] but argues that it successfully introduces clients' inventions to manufacturers (RAB at 28) and that it successfully promotes these inventions. (RAB at 29) The record, however, establishes that respondents' lack of success in introducing or promoting inventions is notable, and that very, very few clients achieve any measure of success with their inventions. (ID 58) Respondents' dismal success record is discussed in detail below in Section V. As the ALJ summed up,

> RLO's entire advertising representations, oral representations by Account Executives, and its method of operation are designed to create in the minds of potential clients the definite understanding that their invention has been examined and studied by a competent, knowledgeable and experienced organization who has determined that the idea or invention is worthy of presentation to industry and that there is a good chance it will be successful. (ID p. 123)

[23] Quite simply, the picture respondents paint of their marketing efforts and successes does not correspond with reality. We conclude

[15] RLO attacks the ALJ's reliance in ID 54 on the testimony of former account executives who were fired and were in litigation with RLO. (RAB at 27) The law judge expressly considered and rejected respondents' arguments concerning the credibility of several of its former employees. (ID p. 143) We do not believe the ALJ erred in giving weight to the testimony of these witnesses. Such testimony is consistent with the testimony of other witnesses and with documentary evidence relied upon by the law judge. (*See* ID 49-52)

that RLO, as the complaint alleges, failed to live up to the claims it made in connection with the marketing of inventions.[16]

D. *Other Claims*

The complaint alleges that respondents made other misrepresentations and failed to disclose certain material facts. With one exception,[17] the ALJ sustained these allegations. At issue are charges involving RLO's use of the names, photographs and quotations of public officials, respondents' claims concerning their status as registered patent attorneys, and RLO's non-disclosure of information about additional client fees and its rights as an interest holder in the inventions of its customers.

The representations previously discussed—that RLO will evaluate an idea, develop or refine it, and then introduce and promote it to industry—describe the very services that RLO purports to offer the inventing public. While the representations under challenge here do not go directly to the heart of respondents' operations, they do encompass peripheral claims designed to enhance RLO's image as a firm of experience and integrity. [24]

In a series of findings (ID 169–84), the ALJ describes respondents' practice of using in promotional materials the names and photographs of prominent public officials along with quotations from these officials impliedly endorsing RLO. The quotations were typically lifted from routine responses written by public office holders to letters from RLO describing the services it offers that might be of interest to constituents.[18]

RLO contends on appeal that the photographs and quotations were accurate and true, and that there is no evidence that their use had the tendency or capacity to mislead anyone into believing that these people endorsed or used RLO. (RAB at 39) We disagree. The fact that the quotations are accurate is, of course, beside the point. That words and sentences may be literally true does not necessarily prevent them from being used to mislead or deceive. *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 675 (2d Cir. 1963); *Koch* v. *FTC*, 206 F.2d 311, 317 (6th Cir. 1953). We believe that RLO's use of the names, photographs, and words of public officials had the tendency and capacity to

[16] Although the complaint alleges that RLO claims to introduce, promote, and negotiate with manufacturers on behalf of clients, there is little record evidence about negotiations. Since efforts to introduce and promote inventions stimulate so little interest there is little opportunity for negotiations to occur. However, there is no evidence to indicate that RLO failed to negotiate with manufacturers that expressed interest in an invention.

[17] The ALJ found that complaint counsel had not met its burden of proof as to unnecessary delay by RLO in obtaining patent protection for its clients. (ID 160) This finding was not appealed.

[18] The list of office holders includes several Governors and Members of Congress. Respondents' Motion for Inclusion of Certain Exhibits and Renumbering of Others, January 30, 1978, which concerns documents related to this issue, is hereby granted.

deceive and mislead consumers into believing that these officials recommended or endorsed the organization. It is, of course, unnecessary to establish that actual deception has occurred to find a violation of the Federal Trade Commission Act. *Simeon Management Corp* v. *FTC, supra,* 579 F.2d at 1146 n.11; *United States Retail Credit Ass'n, Inc.* v. *FTC,* 300 F.2d 212, 221 (4th Cir. 1962); *Charles of the Ritz Distrib. Corp.* v. *FTC, supra,* 143 F.2d at 680.

To be sure, public officials are frequently photographed with constituents and exchange of correspondence is a common occurrence. But there is quite a difference between the display of such pictures and communications as mementos and their inclusion in promotional materials in a manner which implies endorsement of the products or services offered. That respondents' actions here had the capacity to deceive potential customers can be fairly inferred from an examination of RLO's promotional brochures that contain references to the statements of public officials. (ID 169–72) Testimony by RLO clients and public officials, who strongly objected to respondents' use of their names, pictures and quotations, further underscores the deceptive potential of RLO's practices. (ID 173–74, 179, 182–83).[19] [25]

We also uphold the law judge's finding that respondents failed to disclose the material fact that they were not registered patent attorneys or patent agents and were not qualified to practice before the United States Patent Office. Respondents frequently list the background and qualifications of Raymond Lee in promotional material for RLO. (CX 2–3, 49, 53–55) Advertisements, brochures, and letterheads list Lee's educational background (degrees in industrial engineering and law) as well as his professional background before he became an invention developer. The promotional material typically states that Lee is a former United States Registered Patent Attorney, Canadian Patent Agent, United States Patent Office Examiner, and Department of the Army Patent Advisor. (CX 2604k, 60d, 44d, 53a). The question is whether the qualifying word "former," which consistently appears in these materials, prevents or cures any misleading or deceptive impression that would otherwise arise. We conclude that, in context, it does not.

In so concluding, we note that respondents' customers lack familiarity with the intricacies of patent law and the legal limitations on the patent advice and services respondents may provide. (ID 151, p. 129) Given this situation, it is not unreasonable to

[19] Respondents assert that the Commission is without jurisdiction to act against the unauthorized use of the names and photographs of public persons and that we seek to enforce a private right of action. (RAB at 39) This contention is without merit. Whether a private right of action exists is of no relevance in determining whether there is a violation of Section 5.

assume that potential clients of RLO would rely on respondents' representations concerning their legal qualifications and expertise. Our concern is with how these persons perceived RLO's representations since the capacity of a representation to deceive must be determined in light of the sophistication and understanding of the group to whom it is directed. *Beneficial Corp.* v. *FTC, supra,* 542 F.2d at 618; *Aronberg* v. *FTC,* 132 F.2d 165, 167 (7th Cir. 1942). The law is not made for the protection of experts but for the public who may be governed by appearances and general impressions. *Helbros Watch Co., Inc.* v. *FTC,* 310 F.2d 868, 869 n.4 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 976 (1963); *P. Lorillard Co.* v. *FTC, supra,* 186 F.2d at 58; *Florence Manufacturing Co.* v. *J. C. Dowd & Co.,* 178 F. 73, 75 (2d Cir. 1910). [26]

RLO's promotional materials stress that it provides patent-related services to its clients. Although RLO denies offering "patenting services" to inventors (RAB at 25), it clearly represents that it offers services involving patents, regardless of how those services are described.[20] Patents are featured prominently in its advertising (CX 3, 28, 40), and there are additional references to the protection of ideas and inventions. (CX 49, 19) "Patent research" and "patent marketing" are listed as separate services on its letterhead. RLO frequently refers to the high qualifications of its staff and its expertise in dealing with inventions, including expertise in patents. In one brochure, RLO states:

> Our Product Research Department will act as your Intelligence Agency [to] probe and study . . . related records of the United States Patent Office. They search prior U.S. patents . . . . They wind their way through Patent Office records and corridors often talking to Patent Office Examiners . . .
>
> Each person in our Product Research Department . . . is a specialist in his field, in some cases having been an Official Examiner in the U.S. Patent Office where he received his "basic training." (CX 44i)

[27] The cover of the Inventors Information Kit also represents under the heading "Safeguarding your invention" that "We can help you establish 'International Rights of Priority' for your invention." (CX 49d)

In this context it is not surprising that RLO clients believe that respondent Lee is a patent attorney and that RLO is qualified to

[20] Respondents correctly observe that the ALJ's citations do not support his finding that RLO provides patenting services to clients. (ID 5) The exhibit and the testimony relied upon refer only to Napatco, Inc. and National Patent and Trademark Company in connection with patent services. (CX 2606u-w) Respondent Lee is a director and officer of these companies, which provide patent and trademark services for attorneys. (*Id.;* Tr. 434-35) In finding that respondents offer "patenting services" or "patent-related services," we rely on respondents' advertising, promotional materials and language in the preliminary product research agreement. (*See, e.g.,* CX 2-3, 49, 53-55, 60, 201)

perform patent-related duties. (ID 149) To be sure, respondents do disclose that in those cases where RLO enters into a joint venture agreement with an inventor for the development and marketing of a product it will retain the services of a registered patent attorney to establish patent pending status. In our view, such limited disclosure is insufficient to alert clients that RLO has no one on its staff to file patent applications or give advice about the patentability of an invention.

Moreover, respondents' use of the word "former" in describing the patent qualifications of Raymond Lee, while technically and literally true, is ambiguous and has the capacity and tendency to leave clients with the mistaken notion that respondents are qualified patent attorneys. It is well established that partial truths can be as misleading and deceptive as outright misrepresentations. *L. G. Balfour* v. *FTC,* 442 F.2d 1, 17 (7th Cir. 1971); *P. Lorillard Co.* v. *FTC, supra,* 186 F.2d at 58. Advertisements may be deceptive if they have the tendency or capacity to convey misleading impressions to consumers even though other non-misleading interpretations may also be possible. *Chrysler Corp.* v. *FTC,* 561 F.2d 357, 363 (D.C. Cir. 1977). Here we have partial truths sprinkled among representations that impart the overall impression that respondents are qualified to provide advice and services which, in fact, they cannot provide. We find that respondents failed to disclose material facts about their status, or lack thereof, before the Patent Office.

Respondents also contest the ALJ's finding that they failed to disclose material facts concerning the consequences of an assignment of an interest in a patent. RLO's development contracts typically provide that the inventor assigns a twenty percent interest in the invention to RLO. (ID 161) This interest is recorded in the Patent Office whenever a patent issues on an invention that is the subject of a development contract. Patent law provides that, absent an agreement to the contrary, a joint owner of a patent may make, use or sell the patented invention without the consent of other joint owners. (35 U.S.C. 262) Thus, a joint owner of a patent may exploit the patent without making any accounting or reckoning to other joint owners, and without being subject to a lawsuit for an accounting. (Tr. 1100–01, 3251) No doubt such information would be of importance for anyone considering the assignment of an interest in a patent.

The record is clear that RLO did not disclose this information to clients, either before or after they assigned an interest in their invention to RLO. However, the record is also clear that [28] RLO never attempted to make, use or sell an invention in which it was co-

owner without the consent of the inventor or without accounting to the joint owner. There is no indication that respondents ever tried to take advantage of clients' vulnerability under 35 U.S.C. 262. While under other circumstances the failure to disclose such information might be deceptive, we do not find that to be the case here.

Finally, respondents also take issue with the law judge's finding that they failed to disclose the material fact that additional fees might have to be paid. The development contract provides that RLO will undertake the steps necessary to develop an invention and introduce it to industry in exchange for an assignment of a twenty percent interest in the invention, plus a stated flat fee, which has varied over the years. The contract further recites that respondents "will pay our proportionate shares of Government fees and, if prosecution of the patent application is agreed upon, we will pay our proportionate shares of those fees or costs upon which we mutually agree." (CX 100a, 367). It is this last phrase that respondents rely on to support their contention that the potential extra cost is clearly disclosed.

We disagree that this vague provision alerts clients to the fact that invariably they have to pay substantial extra fees if they follow through with RLO's program. The clear message conveyed by respondents' advertising and promotional materials, as well as the development contract itself, is that RLO provides a package of services for inventors—from patent search, to development of the idea, to filing a patent application, and finally to marketing the invention to industry. Moreover, the development contract specifically states that there will be no additional cost to the client for the retention of an attorney to file a patent application. Under these circumstances, customers of RLO could be expected to conclude that there would be no charges in addition to the flat fee and minority interest, except for relatively minor government filing fees.

The record, however, reveals that substantial additional legal fees are regularly required in the course of prosecuting a patent application. This is due to the fact that patent applications are frequently rejected in their initial form, thereby requiring that amendments be filed if the patent is to be pursued. Such an occurrence is not peculiar to the inventions handled by RLO or to the patent attorneys it retains to file and prosecute applications. (Tr. 3257–58, 2871–72) The attorney's fee for filing an amendment, as disclosed in the record, typically ranges from $75–$135. (ID 135)

Moreover, as the law judge noted, even the government patent fees are substantial. Not only is there a Patent Office filing fee of $65 but, if a patent is granted, there is a minimum issuance fee of $112. In

addition, the fee for recording RLO's [29] interest in the invention is $20. (ID 135) Though clients may be willing to pay these extra charges, the development contract fails to disclose adequately the nature or magnitude of these additional costs.

In view of these facts, we believe that respondents' representations about the cost of their services were misleading. To prevent deception, respondents should disclose the likelihood that significant additional fees will be required.

IV. Value of RLO's Services

In addition to the specific misrepresentations alleged, the complaint charges that respondents' unfair or deceptive practices have induced persons to pay substantial sums of money for services that are of little or no value to them and respondents have failed or refused to refund the money. The use of these practices by respondents and their continued retention of monies received is alleged to be an unfair act or practice and a continuing violation of § 5. These allegations were upheld by the ALJ. Respondents counter by claiming that they perform a useful and valuable service for which clients pay fair and reasonable compensation. (RAB at 40) They also question the legal authority for the allegations, citing *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974). (RAB at 40)

It seems beyond dispute that the Commission may condemn practices that deceptively induce persons to purchase virtually worthless services. *See Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1179–81 (1975), *aff'd mem. sub nom. Turner* v. *FTC*, 580 F.2d 701 (D.C. Cir. 1978); *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 648–51 (1973), *rev'd in part sub nom. Heater* v. *FTC, supra*, 503 F.2d 321 (refund provisions set aside); *cf. Windsor Distrib. Co.*, 77 F.T.C. 204, 215–17 (1970), *aff'd*, 437 F.2d 443 (3d Cir. 1971).[21] Similar issues are involved here. As we discuss more fully below, the record evidence demonstrates that a gross disparity exists between the value of services provided by RLO, and what customers are led to expect. Whether viewed in an absolute or relative sense, RLO's clients get little or nothing out of the bargain. Even if RLO's services as performed have some marginal value beyond that which the Commission found in *Koscot, supra*, such limited value clearly is insufficient to overcome the basic unfairness and deception that

[21] Even if we were precluded from ordering refunds or restitution for past practices, *see Heater* v. *FTC, supra*, (a position we do not concede), the Commission clearly is not precluded from fashioning whatever prospective remedy is appropriate to prevent the repetition of such unfair or deceptive practices. *See Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 757 n.33 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 467–70 (1972), *aff'd*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973) and cases cited therein.

inheres in the sale of services that have no reasonable prospect of achieving the results claimed.

Moreover, apart from the cases cited above, additional support for the legal theory being pursued here can be found [30] in both the common and statutory law to which we frequently look for guidance in determining whether particular acts or practices are unfair or deceptive.[22] For example, courts have ordered relief where sales have been induced through fraudulent misrepresentations and the products or services involved are of little or no value,[23] or where the price paid is grossly disproportionate to reasonable market value.[24] Thus, to allege that it is an unfair act or practice for a respondent to sell worthless or near-worthless services by inducing purchasers to enter into the transaction through material misrepresentations simply brings within the context of Section 5 a well-established principle of common and statutory law.[25] [31]

We have already dealt at length with the numerous deceptions and misrepresentations that characterize respondents' business practices and will not discuss them further in detail.[26] Our focus here is whether such misrepresentations and deceptions induce inventors to pay substantial fees to RLO and whether they receive in return services of little or no value. In deciding whether to enter into a contract with RLO, prospective clients frequently rely on respondents' representations about their experience and expertise and about the services they purport to perform for their clients. It takes little more than a look at the facts and figures of respondents' business to conclude that its services have no reasonable prospect of

[22] *See FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) citing the Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 F. R. 8324, 8355 (1964):

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen.)

[23] *See, e.g., Vertes* v. *GAC Properties, Inc.*, 337 F. Supp. 256, 258, 261 (S.D. Fla. 1972) (rescission ordered where land sale secured through misrepresentation about its value and other characteristics); *Kugler* v. *Romain*, 58 N.J. 522, 279 A.2d 640, 653 (1971) (contract unconscionable where price was 2 1/2 times reasonable market price, and product—"educational" children's books—had little or no value for purposes represented); *cf. Lefkowitz* v. *ITM, Inc.*, 275 N.Y.S.2d 303 (1966) (injunction ordered where consumers induced to pay exorbitant, unconscionable prices for products because of fraudulent statements).

[24] *See, e.g., Toker* v. *Perl*, 103 N.J. Super. 500, 247 A.2d 701 (1968), *aff'd*, 108 N.J. Super. 129, 260 A.2d 244 (1970); *Toker* v. *Westerman*, 113 N.J. Super. 452, 274 A.2d 78 (1970); (price which is 2 1/2 times retail value is unconscionable); *Jones* v. *Star Credit Corp.*, 298 N.Y.S.2d 264 (1969) (unconscionable to sell for $900 freezer with maximum retail value of $300); *American Home Improvements* v. *MacIver*, 105 N.H. 435, 201 A.2d 886 (1964) (contract unconscionable where $2,568 home improvements contract included $1,600 in finance charges and sales commission).

[25] *See also* section 2-302 of the Uniform Commercial Code, which permits reformation of a contract if any of its terms, including price, is unconscionable.

[26] The ALJ has summarized the most pertinent in ID 185-93.

achieving the results claimed and its clients receive virtually nothing of value in exchange for the fees they pay to RLO.

In 1974 RLO sold 3,819 preliminary product research agreements, typically for $100 each. In 1975, the number increased to 4,938. (ID 12) The researchers who conduct the preliminary patent searches are independent contractors located in Washington, D.C. and Virginia, near the Patent Office, who are paid $5 to $8 by RLO on a *per-search* basis, plus the costs of patent copies, postage and photocopies. (ID 11) One patent law expert testified that the usual patent search takes a minimum of four or five hours, and that a patentability search is "essential" before filing a patent application. (Tr. 3276–77) It would appear that a patent search taking four or five hours time is unlikely to be performed for $5 to $8, and that the patent searches conducted for RLO clients are something less than adequate.[27] Several witnesses testified that the patent searches for RLO clients typically yielded only limited information and were poorly conducted. (ID 197) [32]

After patents are located in the Patent Office, they are mailed or shown to the client for the client to evaluate and compare with his or her own idea or invention. (ID 198) A patent law expert testified that sending patent copies to laypersons was "irrelevant" since they are incapable of making informed judgments about patentability. (Tr. 3247) The Deputy Solicitor of the Patent Office testified that merely providing copies of prior patents and asking the inventor to make his own evaluation, "forces the inventor to be his own patent counsel" (Tr. 1090), adding that the inventor is not in a position to assess patentability in any objective way. (Tr. 1090–91) No employee of RLO is authorized to render a patentability opinion and the record is clear that they do not provide such opinions. Although patent practitioners are routinely retained by RLO to file patent applications, they do not meet with RLO clients to counsel about the advisability of pursuing a patent in light of what turns up in the preliminary product search. (ID 199)

RLO encourages inventors to pursue the patenting and marketing of an idea even when its staff knows or should know that the chances of success are nil. (ID 205–06) For example, RLO does not advise inventors as to possible duplication of their ideas with those

[27] RLO contends that it is wrong to compare the preliminary product research agreement to a patent search inasmuch as it does not purport to be a patent search and should not be judged by those standards. (RAB at 43) However, the terms of the research agreement specifically state that the program includes compilation of pertinent data and instructions for research of U.S. Patent Office records, classification for subject matter and field of investigation, research of records of prior U.S. patents pertaining to the invention, and procurement from the Patent Office of copies of related patents. (CX 201) RLO has not meaningfully distinguished its activities from a patent search nor did it make any such distinction evident to its customers. Moreover, as we have previously shown, respondents make many other representations about the patent services they provide.

submitted by other RLO clients. One former account executive testified that he received certain ideas many times:

> I received inventions, for example, an invention like a toothbrush with the toothpaste in the handle many times, sold searches on each and every one of them; dog feces picker-uppers, many of those; toothpaste dispensers, many of those; automatic jacking systems, many of those; hoop type toys, people who were trying to emulate . . . the success of the hoop, the Hula-Hoop . . . . (Tr. 4227)

He also testified that he told clients every time that the preliminary patent search results indicated "go." (Tr. 4262) [33]

Consumer testimony establishes that prospective clients entered into preliminary product research agreements because they relied on RLO's representations that experienced and expert assistance would be provided in getting patents. One inventor testified that he examined a patent found during the preliminary patent search but "didn't think it was close enough to bother mine. Being that I was advised to go ahead, apply for a patent, I figured [RLO] didn't figure these would knock mine out either." (Tr. 2376; CX 1209) The witness further added,

> Well, I knew they looked to see if anything was patented like mine and then I knew this would be sent to [RLO] and I hoped if there was anything close to mine they'd advise me whether I should go ahead or not, which they did. They advised me to go ahead. (Tr. 2430–31)

Other clients related similar experiences. (ID 81, 84)

When forwarding copies of patents obtained in the preliminary patent search, RLO also sends a development contract. In 1974 RLO sold 1,498 development contracts; in 1975, 1,585. (ID 16)[28] The record indicates that the price range for development contracts is $775 and up.[29] We have previously discussed RLO's misrepresentations about its development and marketing services, including consumer reliance on such representations, and will not go over this ground again. *See supra* p. 18. Rather, we focus our attention on the usefulness of RLO's promotional and marketing efforts, since those efforts are central to the value of the invention services purportedly offered by respondents. [34]

Marketing experts, patent attorneys, and RLO clients testified about the inadequacies of RLO's system for attempting to promote ideas to industry. Dr. Gerald G. Udell, Associate Professor of

[28] Total revenue figures are: 1972 – $1,396,264; 1973 – $1,241,822; 1974 – $1,115,354. 1975 figures were received *in camera*. (ID 23)

[29] The record includes less expensive development contracts, but shows that fees have risen over the years. One former account executive testified that development contracts were $975 when he started in 1974, and were up to $1,075 and $1,375 when he left in 1975. (Tr. 4225) RLO states in the California disclosure statement that the fee ranges from $1,000 to $2,000. (CX 2600b)

Marketing and Director of the Experimental Center for the Advancement of Inventions and Innovations at the University of Oregon, testified that the independent inventor typically lacks the necessary expertise to evaluate the marketability of his or her invention. (ID 204) Patent counsel testified that they invariably advise unsophisticated, independent clients about the small chance of ever making money on an invention. A patent attorney retained by RLO to handle patent applications also stated that he will not file a patent application for his non-RLO clients unless some market for the invention can be shown. (ID 203)

Respondents do not perform, or have anyone else perform, any analysis to determine if a market exists for a particular idea. The president of a company that specializes in new product marketing and development, Eugene M. Lang, testified that studies or test data are necessary to support a claim to prospective manufacturers that a market exists for a particular product. (ID 206) Professor Udell observed that promotion of unevaluated ideas is highly ineffective because it clogs the channels of distribution with ideas that lack feasibility, which raises search costs to corporations seeking new ideas. *(Id.)*

More specifically, many witnesses criticized RLO's method of marketing new ideas and inventions to prospective manufacturers. Mr. Lang thought little of the prospectuses sent out by RLO, noting that they contain "rote observations" about production feasibility and market demand. In addition, he characterized some of the inventions as being "clearly ridiculous." (ID 208) Another licensing expert, John S. Yates, also criticized the boilerplate language in the prospectuses and observed that they frequently disclose inventions that lack novelty. (ID 209) Vere L. Hageman, a mechanical engineer and a corporate manager of new product development, testified that many of the prospectuses contain old ideas; some are "technically impractical, maybe even bordering on stupid"; while others are incomprehensible. (ID 210) After examining several RLO prospectuses, Robert Goldscheider, a marketing expert, acidly commented that:

> I believe that none of these prospectuses, not a single one, can be given serious credence by a serious businessman. They are superficial. They are incomplete. They are uninformative on truly meaningful points, and I'm seriously doubtful a market even exists for any of these things as set forth in these [prospectuses]. (Tr. 5260–61)

[35] Clients who followed up on the marketing of an idea invariably found that the prospectus mailing list was haphazardly compiled and

included companies that had gone out of business, were in entirely different product lines or had never received the prospectus. (ID 215)

The dismal success record of RLO lends further support to our conclusion that their services are of little or no value. RLO negotiated only eight licenses for its clients during the eight-year period from 1968 to 1976. (ID 194) Four of these licenses were for the same invention, a product called the Carousel Fireplace. (CX 3037; Tr. 5119) Furthermore, pursuant to California law, RLO discloses that of the approximately 30,000 inventors it has assisted, only three received more money as a result of RLO's services than they paid to the firm in fees. (CX 2600a) Although the figures are not precise in terms of whether RLO's service is getting better or worse over time, the inescapable conclusion is that very, very few of RLO's clients receive services of any value from RLO, despite the substantial sums paid to respondents.[30]

In reaching this conclusion we are cognizant of the fact that services of value can be rendered which do not result in licenses, profits or other tangible measures of success. For example, a service of considerable value could be rendered by objectively examining an invention and advising the inventor, if appropriate, that his or her idea has little merit and less chance of success. Although this kind of service is harder to quantify and might not appear in RLO's track record, the simple fact is that RLO does not provide that kind of honest advice to its clients. Rather, respondents encourage inventors to pursue the patenting and marketing of ideas or inventions through purchase of RLO's programs, even when RLO staff knows or should know that there is little chance of receiving a patent and even less of realizing any degree of commercial success.

Respondents contend that inventors are motivated by more than the prospect of financial gain, and that RLO offers services of value because it assists inventors in achieving non-monetary rewards. (RAB at 41–42; CX 2600a) Although we have no doubt that inventors have a sense of self-satisfaction and pride in their work, particularly if the work results in a [36] patent, it is clear that RLO's clients are not contracting with the organization for pride and self-satisfaction.[31] They are contracting for the services which RLO has represented it will provide. That respondents benefit from the often

[30] We give little credence to respondents' contention, which has no record support, that many clients may successfully market their inventions without RLO's knowledge. (RAB at 30) As the ALJ succinctly put it, "[i]t is incredible to contend that any significant number of clients have successfully licensed inventions partially owned by RLO without RLO having some knowledge of this fact and participating in the rewards." (ID p. 134)

[31] We note in passing that the record is filled with the testimony of clients who found that their relationship with RLO was a source of frustration and disappointment rather than pride and self-satisfaction. (*See, e.g.*, Tr. 1831, 3185–88, 3195–3213).

unrealistic optimism of home inventors, coupled with their lack of sophistication, only underscores the gravity of the law violations.

The one RLO service that may have been of some marginal value to some inventors is assistance in obtaining patents, but even here RLO has a poor performance record. Since 1968, RLO has recorded only 590 patent assignments, which represents about a 20% patent issuance rate. (ID 201) In 1974, 1,498 clients entered into development contracts and 217 clients obtained patents (about 14.5%); the comparable figures for 1975 are 271 patents issued for 1,585 development contracts (a 17% issuance rate). *(Id.)* To put these figures into some perspective, we note that patents were issued in approximately 66% of all patent applications filed with the Patent Office. (ID 200)

More importantly, a patent does not mean that the invention will be marketed, much less that it will be a commercial success. (ID 202) This is illustrated by the cold facts of the record, namely the disparity between the 590 patents RLO assisted its clients in obtaining and the number of inventions it has licensed to industry—eight licenses on five inventions. It also bears repeating that customers are contracting for a complete service that purports to encompass much more than assistance in obtaining an unmarketable patent.

In our view, the record convincingly demonstrates that respondents provide worthless services that bear little resemblance to what they tout in their advertising, promotional, and sales pitches. These unfair and deceptive practices are exacerbated by respondents' acceptance and retention of the substantial fees that inventors pay in the reasonable hope and expectation that respondents will provide the expert assistance they represent. We conclude that the complaint allegations have been sustained. [37]

V. Respondent Peska

In holding respondent Peska liable for acts and practices at RLO that violated Section 5, the law judge looked to Peska's long association with the company, his position as Vice President after RLO was incorporated and his active participation in and control over such activities as sales, advertising, public relations, and employee supervision. (ID 220–25) Having concluded from this that the individual respondent had been responsible for the challenged acts and practices, the law judge then considered whether an order should be entered. Based on evidence that Peska, after leaving RLO, engaged in practices similar to those under challenge here through his own firm, Lawrence Peska Associates, Inc. ("LPA"), the ALJ

concluded that order coverage should be extended to this respondent. (ID 226–31, p. 146–47) We affirm.

Respondent Peska claims that he played a subordinate role in the affairs of RLO; that he severed his relationship with the firm nearly three years before the complaint was issued; that the Commission is unlawfully attempting to try his firm, LPA, *in absentia;* and that the order as to him is unconstitutionally vague because of the dissimilarities between his business and that of the other respondents. (PAB at 1–6) However, the record evidence does not support the relevance of the second contention or the correctness of the others. Instead it establishes that Peska played a major role for eight years in the formulation and execution of exactly those aspects of RLO's activities which are the subject of this proceeding. (ID 221–25) Moreover, the evidence pertaining to respondent Peska's business activities after leaving RLO, which the law judge properly admitted for purposes of ascertaining the need for relief, establishes that Peska has continued to engage in invention development efforts similar to those of RLO. (ID 226–31)

In determining whether individual liability should attach to actions that also involve a corporate respondent, the Commission may consider a variety of factors, including the nature and scope of the unlawful practices, the individuals's involvement with those practices, and his or her role in the corporate entity. *See National Housewares, Inc.,* 90 F.T.C. 512, 598 (1977) and cases cited therein. Peska makes much of the fact that he was neither a director nor a shareholder in RLO (PAB at 4), but it is clear that this is not dispositive of the liability of an individual who is instrumental in formulating or carrying out challenged acts and practices. The Commission's authority to find liability on the part of individuals has been upheld for principals, presidents, board chairmen, directors, officers, organizers, managers, and employees. *See National Housewares, Inc., supra,* 90 F.T.C. at nn. 36–43. The record supports Peska's own admission that he was second-in-command to Lee in the operation of all phases of the business (CX 374C; ID 221), and Peska cannot rely on the fact that he did not own stock in RLO nor sit on the board of directors to absolve him of responsibility. [38]

The foregoing considerations are quite sufficient to establish respondent Peska's liability for the challenged acts and practices. Peska was intimately involved in the illegal conduct for many years. The fact that he severed his relationship with RLO before the complaint issued could, at most, bear on the issue of whether, notwithstanding his violative conduct, Mr. Peska should be excluded from any order that issues. Here, however, the respondent can

hardly attempt to argue that he has "abandoned" the challenged practices when the evidence shows that he continues very similar activities in his own closely held corporation.[32]

It is well established that the Commission has broad authority to fashion relief necessary to assure the effectiveness of its orders, including binding individuals to prevent recurrence of unlawful activity for which they have been responsible and prevent circumvention of orders by changes in the form of a business or its ownership. *See, e.g., FTC* v. *Standard Education Society,* 302 U.S. 112, 119-20 (1937); *Rayex* v. *FTC,* 317 F.2d 290, 295 (2d Cir. 1963). Such relief is appropriate when it is "necessary to close off any wide 'loophole' through which the order might be evaded." *Coran Bros. Corp.,* 72 F.T.C. 1, 24-25 (1967); *accord, Benrus Watch Co.* v. *FTC,* 352 F.2d 313, 325 (8th Cir. 1965), *cert. denied,* 384 U.S. 939 (1966); *Carpets "R" Us, Inc.,* 87 F.T.C. 303, 319-20 (1976). In this case it seems quite fair to say that the challenged practices were perpetrated by individuals acting through a corporation. Under such circumstances, an effective order must cover the activity of the responsible individuals should they attempt to repeat the same activities through a different corporate guise. In affirming a Commission order binding an individual respondent who had resigned as officer and director and disposed of his stock in the corporate respondent before the order was entered, the Second Circuit noted that the individual respondent "was included not because he was still an officer or stockholder of the offending corporation but because he himself had participated in the use of unfair and deceptive acts or practices in commerce. [The corporate respondent] is not the only vehicle through which such acts may be accomplished in the future." *Consumer Sales Corp.* v. *FTC,* 198 F.2d 404, 408 (2d Cir. 1952). Respondent Peska is included in this order for precisely the same reasons. Without his inclusion a loophole would indeed exist through which the order might be evaded.

In fashioning appropriate relief we have paid particular attention to Peska's assertion that an order as to him would be "incomprehensible." (PAB at 5) Without passing judgment on the legality of his current idea promotion activities, we are satisfied that the relief ordered, including the affirmative disclosure provisions, are not only appropriate but necessary to ensure that the practices found unlawful here do not continue to be perpetrated by respondent Peska. [39]

[32] Even had it been shown, as it has not been, that respondent had discontinued the unlawful activity before issuance of the complaint, that would not necessarily be grounds for omission of an order where the public interest otherwise required it. *See Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1403 (2d Cir.), *cert. denied,* 429 U.S. 818 (1976).

VI. Claims of Denial of Due Process

In addition to the substantive issues previously discussed, respondents contend on appeal that they have been denied due process in these proceedings. First, respondents contend that statements by Commission staff to the press constitute evidence of prejudgment and bias. Some of these statements were the subject of an earlier motion by respondents that was denied by the Commission.[33] Second, they assert that complaint counsel refused to negotiate in good faith to settle the matter. (RAB at 5, 12–24) For the reasons stated below, we believe these contentions are without merit.

Respondents note that the Commission has authority to alert the public to suspected violations of law through the issuance of factual press releases. (RAB at 12) *Lehigh Portland Cement Co.* v. *FTC,* 291 F. Supp 628 (E.D. Va. 1968), *aff'd,* 416 F.2d 971 (4th Cir. 1969); *FTC* v. *Cinderella Career and Finishing Schools, Inc.,* 404 F.2d 1308 (D.C. Cir. 1968). They object, however, to staff statements about the invention promotion industry generally and some statements about RLO in particular. Most of the statments to which RLO continues to object on appeal were considered by the Commission in its earlier order. There the Commission stated that it expects counsel appearing before it to comply with Disciplinary Rule 7–107(H) of the Code of Professional Responsibility. The Commission determined that only the alleged comments by counsel of record should be considered in the context of the adjudicative proceeding and that the record did not establish any violations of the Code of Professional Responsibility. Respondents raise no issues here that would convince us that the original ruling was incorrect.

Respondents Raymond Lee and Raymond Lee Organization, Inc. have also filed post-oral argument motions that raise similar issues of prejudgment and bias. The first motion involves a conversation that complaint counsel allegedly had with counsel for a party in private litigation with RLO.[34] The second involves a network television program that focused on RLO's [40] activities,[35] and the third centers on a "Clearance Request and Notice of Action" filed with the Office of Management and Budget.[36] These motions are

[33] Respondents' motion for a mistrial, suspension of hearings and other relief was filed December 14, 1976, as supplemented by letter from respondents' counsel December 15, 1976. The ALJ's denial of the motion was issued January 5, 1977. Some of the issues were certified to the Commission on January 12, 1977. The Commission denied the motion on April 5, 1977.

[34] Motion for an Order Dismissing Complaint or Directing Complaint Counsel to Cease Ex Parte Communications, February 6, 1978.

[35] Motion for an Order Directing Hearing to Determine Prejudice, May 17, 1978.

[36] Motion for Injunction and Other Relief, July 31, 1978.

based on highly speculative facts and a distorted view of the law of prejudgment and bias. Each is hereby denied.

In the first motion, respondents allege that complaint counsel advised an attorney representing a private party who was engaged in litigation or contemplating litigation against RLO to include a particular theory in the case. In RLO's view, this ethical error was compounded by providing unsound legal advice. Respondents claim that this alleged conduct violates the Code of Professional Responsibility, specifically Ethical Considerations 2-7 and 2-4. These provisions prohibit providing advice to a layperson which may result in litigation from which the lawyer can expect a benefit. RLO's own version of the events does not evidence any violation of these Ethical Considerations since the contact, according to RLO, was with counsel, not a layperson, and since the contention that benefit will redound to the Commission attorney because RLO will have more fires to fight is, we believe, without merit.

RLO also contends that the alleged conduct violates Section 5.10 of the Commission's Rules of Practice, which prohibits actions that might result in the loss of complete independence or impartiality, (Section 5.10(d)), or that adversely affect the confidence of the public in the integrity of the government. (Section 5.10(f)). We find nothing in Section 5.10 or in the facts alleged to warrant the relief requested.

The second motion asks for an evidentiary hearing to determine whether any Commissioner, any member of a Commissioner's staff, or any other employee involved in the proceeding saw a television program concerning RLO,[37] and to disqualify any Commissioner who watched the program or whose staff members saw it. The evidentiary hearing would also determine whether Commission employees instigated or assisted in the preparation of the program. [41]

Respondents have cited no authority to support their contention that a Commissioner who viewed a television program that concerned a matter under adjudication by the Commission would be disqualified from further participation in the proceeding. Nor have they cited authority for their supposition that a Commissioner would be disqualified from participating in a matter if a member of a Commissioner's staff viewed such a program. The Commission deals frequently and fairly with well-publicized matters and need not be sequestered from news accounts to assure respondents of its impartiality. Its obligation is to decide cases on the basis of the evidence before it, not on the basis of media accounts. The Commission can find no basis in fact or law for respondents'

[37] The program in question was an April 23, 1978, telecast of the CBS Show "60 Minutes," which included an account of RLO's operations.

contention that viewing a television program would give rise to the kind of bias or prejudice that could serve as the basis for a motion for disqualification.[38]

The Commission has determined that an evidentiary hearing is not necessary in this matter since no basis for disqualification would exist, even if the Commissioners or their staff members had viewed the television program. If a substantial showing of bias or prejudgment has been made, an evidentiary hearing may be appropriate to determine the extent of that bias or prejudgment and whether it warrants disqualification. *See Amos Treat & Co.* v. *SEC,* 306 F.2d 260 (D.C. Cir. 1962). However, no such showing has been made here, and an evidentiary hearing on this issue would serve no purpose.

Respondents also contend that an evidentiary hearing is necessary to determine if Commission employees instigated or assisted the research, documentation or preparation of the television program, and to disqualify any Commissioner on whose staff such employees work. Respondents attempt to build a chain of circumstantial evidence of such assistance by asserting that the producers of the program could not have obtained the information used in the program without the help of Commission personnel. Similarly, they contend that because a portion of the program was filmed at the U.S. Patent and Trademark Office, Commission employees must have provided assistance to the producers of the program. Such speculative contentions are frivolous and do not warrant an evidentiary hearing.[39] [42]

Respondents' latest motion seeks relief because Commission staff has filed with the Office of Management and Budget a form entitled "Clearance Request and Notice of Action" that requests clearance for a questionnaire which would gather information on the idea and invention promotion industry. Respondents' motion appears to assume the results of such a survey would become part of the record of this case. Such an assumption obviously is erroneous and the motion is denied.

We have dealt at some length with respondents' contentions of bias and unfair treatment because these charges have been raised so frequently and so vigorously throughout this proceeding. We note that none of the numerous allegations of prejudicial or biased conduct involves the Commission, any individual member thereof, or

[38] If the Commission determined that mere viewing of a television program, absent other evidence of predisposition or prejudice, could serve as grounds for disqualification, it would adhere to a standard that the courts have refused to apply to jurors who render verdicts in well-publicized criminal trials. *See United States* v. *Haldeman,* 559 F.2d 31, 60–62 & n.35 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977).

[39] We note that the record of this proceeding is public, complaint counsel deny providing any such assistance and the Commission is not aware of any assistance provided by staff personnel.

the Administrative Law Judge. At most, respondents would impute to the Commission a bias alleged of staff, but they have shown no basis for assuming such a link, even if staff bias had been shown, and it has not been. Administrative agencies are entitled to a presumption that they will act properly and according to law. *See, e.g., FCC* v. *Schreiber,* 381 U.S. 279, 296 (1965); *United States* v. *Chemical Foundation, Inc.,* 272 U.S. 1, 14–15 (1926). Respondents have failed to present any evidence to counteract the presumption that the Commission will reach a decision fairly and impartially on the basis of the record before it.

The second aspect of respondents' two-pronged claim of denial of due process stems from the conduct of consent negotiations before the hearings commenced. Respondents use harsh words to characterize the settlement proceedings that eventually broke down, asserting that complaint counsel were vindictive and retaliatory, threatening respondents with lengthy and expensive litigation if they did not agree to restitution, which, RLO contends, was beyond the Commission's power to order. Respondents admit there is no due process right to settle a case, but rest their claim on the grounds that they have a right to be treated fairly in the conduct of settlement negotiations.

Once all the outrage expressed by respondents about this issue is cleared away, not much remains of the claim. Respondents may have been close to a negotiated settlement with only some minor points left to be resolved, and complaint counsel may or may not have "reneged" on some of the issues. Even if the facts are as respondents portray them, they hardly rise to the level of a violation of due process. Respondents admit they can find no precedent in administrative law that would support their claim; they turn instead to criminal cases. Although they suggest that lack of precedent is due to the fact that complaint counsel's conduct is unprecedented in the annals of administrative law, the record does not indicate that these were more or less than hard-fought negotiations that did not end as respondents would have wished. [43]

VII. Relief

Respondents challenge virtually every provision in the ALJ's proposed order (RAB at 53–55), placing considerable emphasis on what they believe to be constitutional infirmities in the recommended relief. We have fully considered respondents' contentions in adopting the order we enter here.

As respondents note, it is now established beyond dispute that there is no commercial speech exception to the First Amendment.

See Bates v. *Arizona,* 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). It is equally clear, however, that commercial speech does not enjoy the same measure of First Amendment protection as political speech and that commercial speech that is false, deceptive or misleading is subject to regulation. *See Bates* v. *Arizona, supra,* 433 U.S. at 383–84; *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 771–72 and n.24. In *Ohralick* v. *Ohio State Bar Association,* 436 U.S. 447, 456 (1978), the Supreme Court explained why noncommercial speech is accorded a greater measure of protection than commercial speech:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

The First Amendment protection afforded commercial speech is based not only on the right of speakers to deliver commercial messages but also on the right of consumers to receive such messages. *See Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 756–57; *National Commission on Egg Nutrition* v. *FTC,* 570 F.2d 157, 162 (7th Cir. 1977), *cert. denied,* 99 S. Ct. 86 (1978). The interest of consumers in receiving commercial speech is "served by insuring that the information is not false or deceptive, and, in fact, coincides with the public interest served by regulation." *National Commission on Egg Nutrition* v. *FTC, supra.* As the Supreme Court noted in *Bates,* [44]

> the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. 433 U.S. at 383.

There is no doubt that the Commission has broad discretion in its choice of remedies deemed appropriate to correct unlawful practices. *See FTC* v. *Colgate-Palmolive Co., supra,* 380 U.S. at 392; *FTC* v. *Cement Institute,* 333 U.S. 683, 726 (1948); *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611 (1946); *Simeon Management Corp.* v. *FTC, supra,* 579 F.2d at 1147; *L. G. Balfour Co.* v. *FTC, supra,* 442 F.2d at 23. Nevertheless, where First Amendment rights are concerned, the Commission must exercise care in fashioning a remedy that goes no

further than is reasonably necessary to prevent recurrences of the violations uncovered. *See Warner-Lambert Co.* v. *FTC, supra,* 562 F.2d at 758. Within this context, we have revised the ALJ's order in several significant respects. In modifying the order we focused on reconciling two goals: preventing respondents from deceiving or misleading inventors, while allowing them latitude in the proper conduct of their business.

A. *Misrepresentations*

We have made several changes in Part I of the ALJ's order, which prohibits certain representations. Paragraph 1 has been modified to permit respondents to represent truthfully that they retain patent attorneys and patent agents if they in fact do so. We believe that the order proposed by the ALJ was overbroad in not making allowance for this.

The prohibition on evaluation or appraisal claims has also been modified to permit such representations but only if respondents, in fact, provide fair, competent, and objective evaluations of ideas and inventions. In view of the central role that these claims play in inducing would-be inventors to purchase respondents' services, it is important to provide some reasonable criteria for determining the accuracy of any evaluation claims should respondents attempt to provide such services in the future. Before respondents could represent that they offer evaluations, they would have to conduct honest and competent analyses of the feasibility of inventions as well as the market conditions and demand for such products. This would include at a minimum the necessary research to determine whether similar products are already on the market and the nature of any markets that may exist for a particular invention.

Further, we have eliminated the absolute prohibition on three related representations about financial gain, successful marketing efforts and client earnings. (*See* Part I, paragraphs 4 and 6 of the ALJ's proposed order). Rather, our order will permit representations so long as they are made in conjunction with a disclosure of respondents' track record in assisting inventors. [45] (*See* Part II, paragraphs 2–4) It is grossly deceptive for respondents to represent that inventors can reap financial benefits through their services, or to imply such gains by touting their promotional efforts, when clients virtually always pay more money to the firm for its services than they get back through sales or licensing of their inventions. We believe, however, this deception can be cured by the simple measure of disclosing the facts. If respondents choose to tell prospects about possible financial benefits they may do so as long as they disclose

what is, to date, the dismal truth about the prospects for financial rewards.

The instructions in Part II, paragraph 5(a) for calculating the track record disclosures allow respondents to draw the figures from any three of the past five years. Since respondent Peska has conducted his own business for six years, he will be able to prepare separate disclosure figures that accurately reflect his own recent performance in assisting clients. He will not be disadvantaged—or advantaged, as the case may be—by having to rely on the record compiled at RLO since his departure from that firm.

Similarly, rather than prohibit outright all representations relating to atypical earnings, our order requires that earnings claims about specific individuals or clients generally must be accompanied by a disclosure of respondents' track record in helping its clients make money from their inventions. We recognize respondents' dilemma if they are prohibited from making accurate representations about one client's earnings unless that experience is typical of all clients. This would, of course, effectively prohibit all earnings claims since the typical client suffers a net loss in attempting to market ideas or inventions through RLO. (ID 58)

Although respondents suggest that inventors who seek to market their inventions through other means fare no better, the record is silent on this. It may well be that the typical clients of even the most competent and ethical invention developers do not regularly derive substantial earnings from their inventions. Thus, recognizing the risks inherent in invention marketing, the order permits respondents to tell truthful success stories, even if those stories involve clients whose earnings are atypical. However, failure to disclose that it is atypical for an inventor to earn money through respondents would be deceptive. *National Dynamics Corp.*, 82 F.T.C. 488, 564–65 (1973), *remanded in part* 492 F.2d 1333, 1335 (2d Cir. 1974), *modified*, 85 F.T.C. 391, 393–94 (1975), *reconsideration*, 85 F.T.C. 1052, 1053–54 (1975), *cert. denied*, 419 U.S. 993 (1974). This deception can be prevented if respondents disclose with each earnings claim how many clients receive a net financial gain from their dealings with respondents.

As for development claims, the record is clear that the only task that respondents perform that could be considered "development" or "refinement" is the preparation of drawings for use in filing a patent application. (ID 123) In the course of preparing such drawings, respondents sometimes fill in details. However, to call this quite limited service develop[46]ment or refinement is deceptive and must be corrected. If respondents choose to represent that they develop or

refine ideas or inventions, they must accompany such representations with a disclosure that this entails only the preparation of illustrations and patent drawings. To assure effective compliance, the order specifies the following disclosure that respondents must make: "Our role in the development of your idea or invention is limited solely to the preparation of illustrations and drawings." Respondents are, of course, free to accurately list and truthfully describe any additional specific services they offer. They may not, however, hide the limited nature of the service they provide behind grandiose terms which promise much more.

Respondents are also prohibited from representing that manufacturers are seeking new product ideas through them or that they have special access to businesses, unless they are in fact retained by corporations or organizations. Although the complaint does not have a precise corresponding charge, it alleges that respondents represent that they actively and successfully introduce and promote inventions to industry. Both the scope of this charge and the evidence introduced pursuant thereto encompass representations that respondents have special access to business and have been retained by corporations to seek out new product ideas on their behalf. Since the record establishes that respondents have no more access to particular corporations or to industry in general than would anyone with a mailing list of manufacturers' names and addresses, respondents' representations to the contrary would be deceptive.

Finally, we have added a separate provision that prohibits misrepresentations about any material aspects of respondents' idea promotion practices. We have also included a provision prohibiting certain misrepresentations by individual respondents in the event they leave the idea promotion business and go into other businesses that offer services or programs to assist clients in making money. Respondents, through RLO, carried on a successful business operation for many years, based in large measure on misrepresentations. Given the severity and duration of the unlawful practices, which could easily be transferred to other enterprises, there is a need to ensure that individual respondents do not transfer the same unfair practices to a new context. The Commission's authority to fence in respondents by prohibiting practices similar to those found to be unlawful is well established. *See FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 393 (1959); *Fedders Corp.* v. *FTC, supra*, 529 F.2d at 1401.

B. *Affirmative Disclosures*

The order requires respondents to make certain affirmative disclosures that differ from those proposed by the ALJ. In addition to

the affirmative disclosures discussed above, which are triggered when respondents make certain representations, a more detailed disclosure statement, set forth in Appendix A of the order, must be included in each piece of promotional literature, other than media advertisements, and furnished to customers in conjunction with all client contracts. The Appendix A disclosure statement incorporates a modified version of the [47] "track record" disclosure proposed by the ALJ, plus a statement that additional fees may be required to follow through with the program and disclosure of the fact that respondents do not evaluate the merits of an idea, unless they, in fact, do so fairly, competently and objectively. We have added the disclosure that respondents do not evaluate product feasibility or marketability because they do not provide such services and their claims to the contrary play a key role in inducing customers to purchase respondents' services.

The disclosures that we order here combine two different sections of the ALJ's proposed order and are considerably shorter. Moreover, we require these disclosures only in promotional literature such as brochures and pamphlets and with contracts, both situations where space limitations are not a problem. Considering that respondents' advertisements in print media are usually small classified or display ads in magazines, newspapers, and telephone directories, we have deleted the requirement that each and every advertisement contain a disclosure statment. A short track record disclosure notice must be used in advertisements only when respondents choose that forum to make certain representations about financial success that, as discussed above, would be misleading and deceptive if not accompanied by disclosure of material facts.

In order to avoid unnecessary burden or expense in complying with this provision, we have specified that respondents may choose any three of the past five years, which need not be consecutive. Thus, respondents will not have to update the figures every year, unless they choose to do so. Additionally, we believe that this flexible time frame should give respondents reasonable opportunity to license or sell inventions and to determine whether their marketing efforts have achieved the minimal degree of success necessary to enable purchasers to recoup the fees paid to respondents.

The record strongly establishes the need for such affirmative disclosure provisions. Even though the order prohibits certain specific misrepresentations, there is no assurance that respondents will not skillfully continue to combine exaggeration, innuendo, half-truths, and omission of material facts to obscure the truth about their services. Indeed, the nature and the pervasiveness of respon-

dents' misrepresentations convince us that crucial information should be brought to the attention of inventors who are considering paying substantial amounts of money to respondents for the services they purport to offer. The Commission has wide discretion in fashioning a remedy deemed adequate to cope with unlawful practices. As the Supreme Court has noted, the Commission need not confine its roadblock to the narrow lane the transgressor has traveled but may close all roads to the prohibited goal, so that an order may not be bypassed with impunity. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *accord, FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957). Here respondents have followed a particularly complex route that is not easily mapped nor easily stopped by roadblocks that simply prohibit specific kinds of representations.

Respondents contend that the Commission is without power to order affirmative disclosures except under very narrow circumstances, citing *Warner-Lambert Co.* v. *FTC, supra,* 562 [48] F.2d at 762. Respondents incorrectly read that decision as limiting the Commission's power to order affirmative disclosures to instances where they are necessary to eliminate a lingering misimpression that has been created by advertising alone. (RAB at 48) On the contrary, the court noted that corrective advertising is not an innovation: "The label may be newly coined, but the concept is well established. It is simply that *under certain circumstances an advertiser may be required to make affirmative disclosure of unfavorable facts.*" *Id.* (emphasis added.) In short, corrective advertising, as used in the context of that case, is simply a term describing one set of circumstances in which the Commission is empowered to order affirmative disclosures.

There are numerous cases holding that it is a violation of Section 5 to fail to disclose material facts if the effect of nondisclosure is that substantial numbers of the public are likely to make purchasing decisions based on false beliefs, whether those beliefs are attributable to past representations or are likely to result if future advertising is left untouched. The Commission's power to require affirmative disclosures to prevent deception is well established.[40]

[40] *See, e.g., Portwood* v. *FTC,* 418 F.2d 419, 424 (10th Cir. 1969); *J. B. Williams Co.* v. *FTC,* 381 F.2d 884, 891 (6th Cir. 1967); *Waltham Watch Co.* v. *FTC,* 318 F.2d 28, 32 (7th Cir.), *cert. denied,* 375 U.S. 944 (1963); *Keele Hair & Scalp Specialists, Inc.* v. *FTC,* 275 F.2d 18, 23 (5th Cir. 1960). *See also, Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 771–72 n.24.

Disclosure of specific facts has been required even in the absence of affirmative misrepresentations.[41] The Commission has also required disclosure notices and warnings for possible product hazards,[42] and to notify consumers of their legal rights in certain transactions.[43] Thus, we believe it is clear that the Commission may require affirmative disclosures where necessary to prevent the repetition of false or misleading representations. Here we have tailored the disclosures in a way which accomplishes the desired remedial objectives while recognizing the need to treat media advertising differently from respondents' promotional literature and contracts. [49]

In determining what disclosures should be required, we have deleted several recommended by the ALJ. First, we have dropped the provision in Part IV, paragraph 1(b) of the law judge's order relating to rights of co-inventors because under the circumstances we do not believe this information is necessary to prevent deception. We have also eliminated the cautionary warning to consult an independent patent attorney in Part IV, paragraph 1(c) of the proposed order. Although this might be wise advice, we do not find it necessary to require its inclusion. Finally, we have deleted the requirements in Part V of the ALJ's order regarding disclosure of time schedules, and the furnishing of written progress reports. Although delay is frustrating at best, in the absence of a finding that respondents unduly delayed fulfilling their contractual obligations, we are reluctant to impose such an order provision.

C. *Other Provisions*

The law judge included a provision in his recommended order providing a 3-day cooling-off period for customers to change their minds about going ahead with contracts for respondents' services. We modify this provision to exclude contracts negotiated and executed exclusively by mail or telephone.[44] The record does not show that a right to cancel is necessary in such instances. However, where the cooling-off period does apply, we believe that a 10-day cancellation period, as provided in the Notice Order, should be afforded rather than the 3-day period recommended by the ALJ. A

[41] *See, e.g., Beneficial Corp.* v. *FTC, supra,* 542 F.2d at 620–21 (uses of financial information must be disclosed); *Brite Mfg. Co.* v. *FTC,* 120 U.S. App. D.C. 383, 347 F.2d 477 (D.C. Cir. 1965) (*per curiam*) (country of origin); *Bantam Books, Inc.* v. *FTC,* 275 F.2d 680 (2d Cir.), *cert. denied,* 364 U.S. 819 (1960) (abridgment of paperback books); *Kerran* v. *FTC,* 265 F.2d 246 (10th Cir.), *cert. denied,* 361 U.S. 818 (1959).

[42] The Commission has required that cigarette advertising affirmatively disclose the Surgeon General's determination that cigarette smoking is dangerous to health. *See Lorillard Co.,* 80 F.T.C. 455 (1972).

[43] *See Portwood* v. *FTC, supra,* 418 F.2d at 424; *All-State Indus. of N.C., Inc.* v. *FTC,* 423 F.2d 423, 425 (4th Cir.), *cert. denied,* 400 U.S. 828 (1970).

[44] This exemption is similar to that contained in the Commission's Cooling-Off TRR, 16 C.F.R. 429 (Note 1(a)(4)), except that in-person contact between respondents and their customers would render the exemption inapplicable only if it occurs before the contract has been signed by a customer.

longer period is appropriate given the complexity and financial obligations associated with these transactions.

In addition to the cooling-off period, we retain other provisions of the law judge's order requiring respondents to deliver copies of the order to their sales personnel, provide 30-days advance notice of corporate changes, and provide notice of the dissolution or commencement of invention-related business activities. As to the latter requirement, we have limited it to 10 years so that individual respondents will not have a lifetime obligation. Finally, respondents are not relieved as a result of this order from any other obligations imposed upon them by federal or state law. If those obligations are inconsistent with the requirements of this order, respondents must notify the Commission of the inconsistency and request advice as to their compliance responsibilities. Inasmuch as other laws and regulations (*e.g.*, Cal. Bus. & Prof. Code, Chapter 17, § 22370, Division 8) may also address the activities under scrutiny here, we have included this provision to facilitate respondents' compliance with the order.

Raymond Lee Organization, et al., Dkt. 9045 Synopsis of Determinations for 15 U.S.C. 45(m)(1)(B)

In order to facilitate application of the Commission's holdings in this case to others who may be engaged in the same practices as respondents, pursuant to the provisions of 15 U.S.C. 45(m)(1)(B), [Section 205 of the Magnuson-Moss Act], the Commission has determined to set forth in synopsis form a statement of the acts or practices determined to be unfair and deceptive in this proceeding.[1] The followings acts or practices are unfair or deceptive trade practices and are unlawful under Section 5(a)(1) of the Federal Trade Commission Act:

1. It is an unfair or deceptive act or practice for a seller of idea or invention promotion or development services to misrepresent, directly or indirectly, that potential purchasers will be provided with evaluations or appraisals of the patentability, merit or marketability of ideas or inventions.

2. It is an unfair or deceptive act or practice to represent, directly or indirectly, that the seller of idea or invention promotion or development services, or its officers, agents, representatives or employees are registered patent attorneys or patent agents, or are

[1] The Commission in its discretion has prepared a synopsis of its determinations in this case in order to simplify application of these determinations to other cases. Such a procedure is not required by 15 U.S.C. 45(m)(1)(B).

qualified to practice before the U.S. Patent and Trademark Office, unless such is a fact.

3. It is an unfair or deceptive act or practice to misrepresent, directly or indirectly, the scope, nature or quality of the services performed to develop or refine ideas or inventions.

4. It is an unfair or deceptive act or practice to misrepresent, directly or indirectly, the scope, nature or quality of the services performed to introduce or promote ideas or inventions to industry.

5. It is an unfair or deceptive act or practice to represent, directly or indirectly, that a seller of idea or invention promotion or development services has special access to manufacturers or has been retained to locate new product ideas, unless such is a fact. [2]

6. It is an unfair or deceptive act or practice to misrepresent, directly or indirectly, that a person, partnership, corporation, government agency or other entity endorses or uses the services of a seller or provider of services.

7. It is an unfair or deceptive act or practice for sellers of idea or invention promotion or development services to fail to disclose, when price information is provided to potential purchasers, all significant fees or charges that may be incurred by purchasers in connection with such services.

8. It is an unfair or deceptive act or practice to misrepresent, directly or indirectly, the background, qualifications, experience or expertise of a seller or provider of services.

9. It is an unfair or deceptive act or practice for a seller of idea or invention promotion or development services to induce through misleading or deceptive representations the purchase of services that have little or no inherent value, or to offer to provide services that grossly exceed the value of the services actually provided. It is also an unfair or deceptive act or practice to retain money from the sale of such services.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having determined to deny the appeal of respondents and sustain the initial decision with certain modifications: [2]

It is ordered, That the initial decision of the administrative law judge, pages 1–156, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent

inconsistent with, modified or otherwise indicated in the accompanying opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

I

It is ordered, That The Raymond Lee Organization, Inc., a corporation, its successors and assigns, Raymond Lee, individually and as an officer of said corporation, Lawrence Peska, individually and as a former officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, with the exception of those offering patent and trademark services to attorneys and registered patent agents only, in connection with the advertising, offering for sale or sale of services relating to the introduction, promotion, development, licensing, marketing or sale of ideas or inventions to industry, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, that any of respondents, or their officers, agents, representatives or employees, are registered patent attorneys or patent agents, or are licensed, recognized or qualified to prepare, file, amend or prosecute patent applications before the United States Patent and Trademark Office, or before any patent offices located in foreign countries, unless such is a fact. [3]

2. Representing, directly or indirectly, that respondents provide potential purchasers of their services with an evaluation or appraisal of the patentability, merit or marketability of their inventions or ideas, unless respondents provide fair, competent, and objective evaluations or appraisals of such inventions or ideas.

3. Representing, directly or indirectly, that corporations or other business organizations are seeking inventions, new products or new product ideas through respondents, or that respondents have any special access to such corporations or other business organizations, unless respondents are regularly retained by corporations or other businesses to find new product ideas. Where respondents represent that they have access to, or are retained by, specific corporations or

business organizations, respondents must in fact be retained by those corporations or organizations.

4. Representing, directly or indirectly, that any person, firm, organization, governmental agency or official has endorsed, used, or has used and been satisfied with respondents' services, unless such is a fact and such person, firm, organization, governmental agency or official has given prior written consent for such representation.

5. Misrepresenting any material aspect of respondents' services or business practices.

II

It is further ordered, That respondents cease and desist from:

1. Representing, directly or indirectly, that respondents will develop or refine inventions or ideas for new products submitted to them by their customers, unless respondents disclose in conjunction with and adjacent to such representations the following statement: [4]

> "Our role in the development of your idea or invention is limited solely to the preparation of illustrations and drawings."

Such statement shall be made in a clear and conspicuous manner in print at least as large as the print containing the representation; or in broadcast media, the statement shall be read at a rate of speed at least as slow as the slowest part of the advertisement.

2. Representing, directly or indirectly, that respondents introduce, promote or negotiate with manufacturers regarding clients' ideas or inventions, unless respondents disclose in conjunction with and adjacent to such representations the statement set forth in paragraph 5 below.

3. Making, directly or indirectly, any earnings or success claims for respondents' clients generally, or for any specific client, unless respondents disclose in conjunction with and adjacent to such representations the statement set forth in paragraph 5 below.

4. Representing, directly or indirectly, that potential purchasers of respondents' services may or will receive financial gain from an idea or invention, unless respondents disclose in conjunction with and adjacent to such representations the statement set forth in paragraph 5 below.

5. Failing to disclose the following statement as required by paragraphs 2, 3, and 4:

> "In (*date*), we sold our complete service to (*total number*)

customers. Of these, (*number*) received more money from our services than they paid us."

Such statement shall be made in a clear and conspicuous manner in print at least as large as the print containing the representation; or in broadcast media, the statement shall be read at a rate of speed at least as slow as the slowest part of the advertisement; and the following definitions shall apply: [5]

(a) "Total number" includes all clients who contracted for respondents' services during any three of the five calendar years preceding the calendar year in which the representation is made; provided that clients who contracted only for preliminary product research need not be included. All numbers shall be stated in Arabic numerals.

(b) "Date" shall be the three calendar years selected for purposes of (a) above.

III

It is further ordered, That respondents shall include the disclosure statement set forth in Appendix A at least once in pamphlets, brochures, and other promotional literature, excluding media advertisements:

1. This disclosure shall be made in a clear and conspicuous manner,

(a) in print at least as large as the largest print in the promotional literature other than respondents' name, but in no case smaller than 10 point boldface type;

(b) set off by a black or colored border that contains only the disclosure statement; and

2. For purposes of the disclosure statement depicted in Appendix A, the following definitions shall apply:

(a) "Total number" includes all clients who contracted for respondents' services during any three of the five calendar years preceding the calendar year in which the promotional literature is distributed; provided that clients who contracted only for preliminary product research need not be included. All numbers shall be stated in Arabic numerals.

(b) "Date" shall be the years selected for purposes of (a) above.

3. If respondents provide fair, competent, and objective evaluations or appraisals, they may omit from the disclosure statement the following language: "We do not evaluate the merits of your idea or tell you whether it can be patented or marketed." [6]

IV

It is further ordered, That respondents shall:

1. Furnish a retainable duplicate copy of the Appendix A disclosure statement with each research agreement, development and marketing contract or other client service contract. Such disclosure statement shall be set forth either on the contract itself or in a separate document that contains no other information and that is attached to and easily detachable from the contract.

2. Have each prospective purchaser of respondents' services acknowledge in writing on the contract or on the separate disclosure document, as appropriate, the receipt of the disclosure statement in Appendix A.

V

It is further ordered, That respondents shall furnish the notice of cancellation set forth in Appendix B to each purchaser of respondents' services, including purchasers of preliminary product research agreements, development and marketing contracts or other client service contracts; *provided,* that such notices need not be furnished and such rights do not apply when all contact between respondents and a prospective purchaser prior to execution of any such agreement or contract is by mail and/or telephone.

1. The notice of cancellation shall be made in the following manner,

(a) The notice of cancellation form shall be furnished in duplicate, attached to the contract and easily detachable.

(b) The notice shall be in at least 10 point boldface type with a heading in 16 point extra-boldface type.

2. Within ten (10) days after receipt of a signed notice of cancellation, respondents shall refund all monies that have been paid to respondents pursuant to the cancelled transaction. [7]

VI

It is further ordered, That respondents shall maintain the following records for a three-year period and make them available for examination and copying by a duly authorized representative of the Federal Trade Commission, upon reasonable notice, during normal business hours:

1. A copy of each advertisement, each radio script, and each television script and film published or disseminated by respondents.

2. Records disclosing the date or dates each advertisement, script or film was published or disseminated.

3. The name and address of each publication or broadcast media disseminating each advertisement, script or film.

4. A copy of each brochure, flyer or other type of promotional literature published or disseminated by respondents.

5. Copies of signed disclosure statements made pursuant to Part IV of this order.

6. Copies of signed notices of cancellation made pursuant to Part V of this order.

7. Copies of all product research agreements, development and marketing contracts, and other client service contracts.

VII

It is further ordered, That respondents shall:

1. Forthwith deliver a copy of this order, incorporating its provisions, to all present and future salespersons or other persons engaged in the sale of respondents' services and secure from each such salesperson or other person a signed statement acknowledging receipt of a copy of this order and their written agreement to adhere thereto. [8]

2. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

3. Promptly notify the Commission for a period of ten (10) years of the discontinuance of any business, occupation or employment concerned with the introduction, promotion, development, licensing, marketing or sale of ideas or inventions and of the affiliation with any other such business, occupation or employment. Such notice shall include a description of respondents' ownership, duties and responsibilities in any other such business, occupation or employment. The expiration of this paragraph shall not affect any other obligations arising under this order.

VIII

It is further ordered, That each individual respondent and every firm, partnership, association, corporation or other business entity that each individual respondent controls or manages, and which

offers, or purports to offer, any service or program to assist a customer in making money do forthwith cease and desist from:

1. Misrepresenting, directly or indirectly, the nature or value of such service or program;

2. Misrepresenting, directly or indirectly, the earnings potential of a customer who purchases or uses such service or program.

3. Representing, directly or indirectly, that any person, firm, organization, governmental agency or official has endorsed, used, or has used and been satisfied with such service or program, unless such is a fact and such person, firm, organization, governmental agency or official has given prior written consent for such representation.

4. Otherwise misrepresenting any material aspect of respondent's service, program or business practices. [9]

IX

It is further ordered, That nothing herein shall relieve respondents of any obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent with any provision of this order, respondents shall notify the Commission of such inconsistency and request advice as to compliance herewith.

X

It is further ordered, That respondents shall, within sixty (60) days after entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Commissioner Pitofsky did not participate in consideration of this matter.

[10] Appendix A

NOTICE

You should be aware that

we do not evaluate the merits of your idea or tell you whether it can be patented or marketed;

in (*date*), we sold our complete service to (*total no.*) customers. Of these, (*no.*) received more money from our services than they paid us;

in addition to the money you pay us, you may have to pay attorneys' fees, Patent Office fees, and other charges in connection with our program. Ask us for complete price information.

[11] Appendix B

NOTICE OF CANCELLATION

If you change your mind, you can cancel this contract within 10 business days after you signed it. If you mailed us the contract, you can cancel it within 10 business days after you put the contract in the mail.

There will be no penalty or obligation if you cancel. Within 10 days after we get your notice, we'll return any money you paid us under this contract.

To cancel this contract, sign and date this notice, or send a letter or telegram of your own telling us you want to cancel. Mail it or give it to us by midnight of the tenth business day after the contract was signed, or after you mailed the contract to us.

Send the notice, letter or telegram to:

name of seller
address

I hereby cancel this contract.

signature
date

IN THE MATTER OF

NATIONAL FIRE HOSE CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VOILATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2935. Complaint, Nov. 1, 1978—Decision, Nov. 1, 1978

This consent order requires a Compton, Calif. manufacturer and seller of fire hose and accessories to cease, in connection with the sale and distribution of their products, from entering into agreements, or taking any other action that would impose territorial or customer restrictions on their distributors.

Appearances

For the Commission: *John Hankins.*

For the respondent: *Earl P. Willens, Buchalter, Nemer, Fields & Savage,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that the parties listed in the caption hereof and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent National Fire Hose Corp. is a corporation organized under the laws of the State of California, with its executive office, plant, and principal place of business located at 516 East Oaks St., Compton, California.

PAR. 2. Respondent Raymond L. Pepp is Chairman of the Board of Directors of respondent corporation. Together with the other individual respondent, respondent Raymond L. Pepp has been and continues to be responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent, including those hereinafter set forth. Mr. Pepp's office address is the same as that of respondent corporation.

PAR. 3. Respondent Dudley H. Pepp is an officer of respondent corporation. Together with the other individual respondent, respondent Dudley H. Pepp has been and continues to be responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent, including those

hereinafter set forth. Mr. Pepp's office address is the same as that of respondent corporation.

PAR. 4. Respondent corporation is engaged in the manufacture, distribution and sale of fire hose to distributors located throughout the United States. These distributors in turn resell to others, including users of fire hose such as fire departments and industrial customers. For the purposes of this proceeding, a "distributor" is defined as any person or firm which buys fire hose directly from respondent corporation for the purpose of resale.

PAR. 5. In the course and conduct of its business of manufacturing and distributing fire hose, respondent corporation ships or causes such products to be shipped from its plant in the State of California to customers in various other States throughout the United States. The respondent corporation is therefore engaged in "commerce" and the business of respondent corporation affects "commerce" as commerce is defined in the Federal Trade Commission Act.

PAR. 6. Except to the extent that competition has been restrained by reason of the practices hereinafter alleged, respondent corporation's distributors, in the course and conduct of their business of distributing, offering for sale, and selling fire hose purchased from respondents, are in substantial competition in or affecting commerce with one another and with other firms or persons engaged in the distribution and sale of other brands of fire hose; and respondent corporation is likewise in substantial competition in or affecting commerce with other persons or firms engaged in the manufacture, sale and distribution of fire hose.

PAR. 7. In the course and conduct of their business, respondents have engaged and continue to engage in the unfair methods of competition, and unfair acts and practices, in or affecting commerce, enumerated in this paragraph:

1. Respondents have established agreements, understandings or arrangements with their distributors whereby such distributors are granted exclusive territories in which to market respondents' fire hose;

2. Respondents have contacted distributors selling respondents' fire hose outside these defined territories and have attempted by various means to coerce such distributors to refrain from making further sales outside their assigned territories; as a result of such coercion respondents' distributors have agreed to refrain from selling respondents' fire hose outside their assigned territories;

3. Respondents have acted in concert with their distributors to foreclose the entry of new distributors into competition with respondents' distributors; and

4. Respondents have established agreements, understandings or arrangements whereby their distributors refrain from selling to particular customers.

PAR. 8. In the manner above described, respondents have entered into and maintained agreements with their distributors which have had and do have the tendency of unduly hindering and restraining competition between such distributors in the sale of respondents' products. Said agreements and respondents' acts and practices in furtherance of them have had and now have the following effects among others:

1. Distributors have been deprived of their freedom to act as independent businessmen;

2. Distributors have refrained from selling respondents' fire hose outside the distributors' assigned territories thereby eliminating or severely restricting competition between such distributors in the sale of respondents' products;

3. Willing buyers and sellers of respondents' fire hose have been prevented from consummating sales;

4. Competition among distributors of respondents' fire hose and companies dealing in other brands of fire hose has been restricted;

5. Buyers of fire hose have been deprived of the benefits of free competition.

PAR. 9. The aforesaid acts, practices and methods of competition have the tendency unduly to restrict and restrain competition and have injured, hindered, suppressed, lessened or eliminated actual and potential competition, are to the prejudice and injury of the public, and constitute unfair methods of competition and unfair acts or practices in or affecting commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act;

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the repondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent National Fire Hose Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 516 East Oaks St., Compton, California.

Respondent Raymond L. Pepp is a director of said corporation. Respondent Dudley H. Pepp is an officer of the corporation. Together, they formulate, direct and control the acts and practices of the corporation. Their address is the same as that of the corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents National Fire Hose Corp., its subsidiaries, successors, assigns, officers and directors, and Raymond L. Pepp and Dudley H. Pepp individually and as officers or directors of National Fire Hose Corp., and respondents' agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, distribution, offering for sale or sale of fire hose or fire hose accessories (hereinafter "products") in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into, maintaining, preserving or enforcing any contract, agreement, combination, or understanding which fixes, establishes, limits or restricts the territory in which a distributor may sell any of respondents' products;

2. Requiring any distributor or potential distributor to enter into a written or oral agreement or understanding, concerning the

territory in which such distributor or potential distributor may sell any of respondents' products, as a condition to receiving or retaining a distributorship;

3. Refusing to sell, delaying shipment, threatening to refuse to sell or to delay shipment, or taking any other action to limit or restrict the territory in which a distributor may sell any of respondents' products;

4. Consulting or communicating with any distributor of respondents' products concerning the establishment of a new distributorship;

5. Entering into, maintaining, preserving or enforcing any contract, agreement, combination, or understanding which limits or restricts the customers to whom a distributor may sell any of respondents' products;

6. Restricting or attempting to restrict, in any manner, the customers to whom a distributor may sell any of respondents' products or the territory in which a distributor may sell such products.

II

It is further ordered, That respondents, for a period of three years from the date of service upon them of this order, establish and maintain a file of all records referring or relating to respondents' refusal to sell any product to any distributor or respondents' termination of any distributor, which file shall contain a copy of any written communication to any such distributor concerning such refusal to sell or such termination. The file shall be made available for Commission inspection upon reasonable notice.

III

It is further ordered, That respondents shall, within thirty days after service upon them of this order, distribute a copy of the order to each of the corporate respondent's operating divisions, to its present corporate officers, to its present sales representatives, and to its future corporate officers and sales respresentatives within five days of their assumption of office or employment with respondent corporation.

IV

It is further ordered, That respondents shall:

1. Within thirty days after service upon them of this order, distribute a copy of the letter attached as Appendix "A" to each

existing distributor who has purchased municipal type fire hose from respondents within the past three years;

2. Distribute a copy of the letter attached as Appendix "A" to each newly established distributor who purchases municipal type fire hose from respondents within the three year period commencing from the date of service of this order upon respondents; this letter to be distributed prior to the first such sale;

3. The distribution of copies of the letter attached as Appendix "A" as provided in this part of the order shall not be construed as a limitation on the other parts of this order.

V

It is further ordered, That respondents shall notify the Commission at least thirty days prior to any proposed change in the organization of the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

VI

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacture, distribution or sale of fire hose or fire hose accessories or of his affiliation with a new business or employment in which his own duties and responsibilities involve the manufacture, distribution or sale of fire hose or fire hose accessories. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall within sixty days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

277-685 O—79——43

Custom Manufacturers of Municipal and Industrial Fire Hose

APPENDIX A

NATIONAL FIRE HOSE CORP.

Date:

TO: ALL DISTRIBUTORS OF MUNICIPAL HOSE

National Fire Hose and the Federal Trade Commission have been engaged in discussions concerning the Company's distribution practices as they relate to certain of our distributors. While the Company has continued to defend its practices in light of relevant factors in the marketplace, we have determined that it is in the best interests of National and you, our distributor, that the matter be put to rest in as simple a fashion as possible causing the least disruption to our distributors and to customers of our distributors. Therefore, for settlement purposes only and without admitting that any acts to this date have violated any law, we have consented to an order issued by the Commission prohibiting us from:

1. Imposing territorial restrictions on our distributors or coercing distributors in any manner to limit the territory in which they sell National's products;

2. Restricting the customers to whom distributors may sell National's products;

3. Communicating or consulting with our distributors concerning the establishment of new distributors.

If, in the future, you believe that National has engaged in any of the practices listed above, you should report the details in writing to:

Federal Trade Commission
Washington, D.C. 20580

All of us at National look forward to serving you on all of your fire hose requirements in the years to come. Your continuing support of National products and policies is greatly appreciated.

Very truly yours,

D. H. Pepp

Main office and factory: 516 East Oak Street, P.O. Box 4569, Compton, California 90224 Dial: 213/537-5211 TELEX

IN THE MATTER OF

GOLD BULLION INTERNATIONAL, LTD., ET AL.

ORDER CLARIFYING AND MODIFYING OPINION IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND HOBBY PROTECTION ACTS

Docket 9094. Decision, July 25, 1978 — Modifying Order, Nov. 3, 1978

This order clarifying and modifying the opinion of the Commission, 92 F.T.C. 196, deletes any finding of liability with respect to the 10 Mark 1887 Kaiser Wilhelm I coin, and deletes the words "by respondents" at the appropriate places, to make clear that the only relationship of individual respondents to the importation of the offending coins was in their roles as owners, officers, and directors of the respondent corporation.

ORDER CLARIFYING AND MODIFYING OPINION OF THE COMMISSION

By motion filed November 1, 1978, respondents have requested that the Commission modify its opinion in two respects, neither of which affects the final order previously entered. Complaint counsel have not objected to the requested modifications. The first requested modification would delete any finding of liability with respect to the German 10 Mark 1887 Kaiser Wilhelm I coin, on grounds that there is record proof of only one specimen of the coin having been imported. (In its opinion the Commission concluded that no liability should be found for another coin, the German 20 Mark 1887 Kaiser Wilhelm I, for the same reason; the change would, therefore, treat the two coins consistently.) The second modification relates to the role of the individual respondents, making clear that their only relationship to the importation of the offending coins was in their roles as owners, officers, and directors of Gold Bullion. The modifications appear warranted. Therefore,

It is ordered, That this matter be reopened, and that the opinion of the Commission be modified in the following two respects:

1. The conclusion at p. 15 of the Commission's opinion (first paragraph) is modified to delete reference to the 10 Mark Wilhelm I (1887) coin, and that coin is dropped from consideration as a basis for the Commission's finding of liability, for the same reasons noted with respect to the 20 Mark Wilhelm I (1887) coin discussed at p. 5, n. 5 of the Commission's Opinion.

2. On p. 23 of the initial decision, the words "by respondents" are deleted from findings 3–5 of the "Summary" of the administrative law judge, and Finding 2 on p. 23 is modified to read:

Gold Bullion International, Ltd. imported into the United States for sale and distribution in commerce, copies of gold coins that were manufactured after November 29, 1973, the effective date of the Hobby Protection Act. The individual respondents did not import coins into the United States in their individual capacities. Insofar as Messrs. Bogart, Costello and Thompson (along with Mr. Mayer) controlled the acts and practices of Gold Bullion or had the ability to exercise such control by virtue of their ownership of the respondent corporation and/or of their roles as officers and/or directors, they are responsible for the importation of coins by Gold Bullion for purposes of enforcement of the Hobby Protection Act by the Federal Trade Commission.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

BORDEN, INC.

FINAL ORDER, OPINIONS, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8978. Complaint, July 2, 1974 — Decision, Nov. 7, 1978

This order, among other things, requires a New York City firm to cease attempting to hinder, restrain or eliminate competition in the processed lemon juice market by granting improper price reductions and promotional allowances to its customers; or by selling its product, ReaLemon, below cost or at unreasonably low prices.

Appearances

For the Commission: *W.M. Rice, K.H. Richman, John M. Peterson, Robert C. Goldberg* and *William J. Tabor.*

For the respondent: *Elroy H. Wolff, David J. Lewis, H. Blair White* and *Charles W. Douglas, Sidley & Austin,* Chicago, Ill. and Washington, D.C.

COMPLAINT

The Federal Trade Commission having reason to believe that Borden, Inc., hereinafter referred to as Borden or respondent, has violated Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

I. DEFINITIONS

PARAGRAPH 1. For the purposes of this complaint the following definitions shall apply:

(a) "Reconstituted lemon juice" means a product manufactured by adding water to a lemon concentrate base, which product, either bottled or canned, can be stored without refrigeration for long periods of time.

(b) "ReaLemon" refers to the brand name of the reconstituted lemon juice product of ReaLemon Foods which is part of the Borden Foods Division of Borden, Inc.

II. RESPONDENT

PAR. 2. Borden is a corporation organized and existing under and

by virtue of the laws of the State of New Jersey with its executive offices located at 277 Park Ave., New York, New York. [2]

PAR. 3. ReaLemon Foods is a part of the Borden Foods Division of Borden, Inc. Borden acquired ReaLemon-Puritan Co., Chicago, Illinois, in 1962. As a separately operated entity in the Borden Foods Division, ReaLemon Foods processes, packs, distributes, and sells reconstituted lemon juice.

PAR. 4. In 1972, Borden's total sales exceeded $2 billion, net income after taxes was approximately $66 million, and total assets were approximately $1.3 billion. In 1973, ReaLemon Foods' total sales were approximately $28 million. ReaLemon Foods' sales of reconstituted lemon juice were approximately $22 million and substantially all of its net income of $3.5 million was derived from such sales.

III. NATURE OF TRADE AND COMMERCE

PAR. 5. The relevant market is the sale and distribution, for resale, of reconstituted lemon juice in the United States and regions thereof.

PAR. 6. Borden, through ReaLemon Foods, dominates the reconstituted lemon juice market. In 1972, industry sales of reconstituted lemon juice were approximately $25 million; Borden accounted for approximately 90 percent of such sales. In 1973, industry sales of reconstituted lemon juice were approximately $25 million; Borden accounted for approximately 80 percent of such sales.

PAR. 7. Approximately 20 firms are presently engaged in the reconstituted lemon juice market. Of these 20 firms, only five firms, in addition to Borden, sell a full range of bottle sizes of reconstituted lemon juice. After ReaLemon Foods, the next largest firm accounted for approximately five percent of sales of reconstituted lemon juice in 1972 and twelve percent of sales in 1973.

IV. JURISDICTION

PAR. 8. In the course and conduct of its business, Borden has sold or caused to be sold reconstituted lemon juice to customers located throughout the United States. There is now and has been for many years a constant substantial flow of Borden's ReaLemon reconstituted lemon juice in [3] "commerce" as that term is defined in the Federal Trade Commission Act. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices hereinafter alleged in this complaint, Borden has been and is in competition with other corporations, partnerships, individuals or firms engaged in the sale and distribution of reconstituted lemon juice.

V. ACTS AND PRACTICES

PAR. 9. Borden, the largest processor, distributor and seller of reconstituted lemon juice in the United States, has used its dominant position, size and economic power to frustrate the growth of smaller reconstituted lemon juice processors and distributors; to reduce their opportunities for business survival; and to prevent, hinder, or lessen competition in the processing, distribution and sale of reconstituted lemon juice. Thus, Borden has been, and is now, engaging in various monopolistic or other unfair acts, practices or methods of competition in maintaining a monopoly in the processing, distribution or sale of reconstituted lemon juice.

More particularly, respondent, since at least 1965, has adopted and placed into effect and carried out various policies, acts and practices to lessen, restrain, eliminate and prevent the distribution or sale of reconstituted lemon juice by others engaged in the processing, distribution and sale of such product in the United States. Among such monopolistic policies, acts and practices, respondent engaged in the following:

(a) Granting selective price reductions which have resulted in different net prices among Borden's ReaLemon customers;

(b) Selling its reconstituted lemon juice below its cost or at unreasonably low prices under circumstances where the effect was, and is, to injure, suppress or destroy competition in the processing, distribution or sale of reconstituted lemon juice; [4]

(c) Granting selective promotional allowances or concessions under circumstances where the effect was, and is, to injure, suppress or destroy competition in the processing, distribution or sale of reconstituted lemon juice;

(d) Disparaging personnel and products of its competitor.

(e) Erecting barriers to entry into the reconstituted lemon juice market through extensive trademark promotion and advertising which has artificially differentiated Borden's reconstituted lemon juice from comparable products of its competitors;

(f) Inducing selected customers to reduce their retail prices on Borden's reconstituted lemon juice by granting special price reductions and/or special promotional allowances or concessions on Borden's reconstituted lemon juice.

VI. EFFECTS

PAR. 10. Borden has engaged and is engaging in acts, practices and

methods of competition as hereinbefore alleged, the effects of which have included:

(a) Monopolizing the reconstituted lemon juice market;

(b) Preserving, maintaining, and furthering a highly concentrated market structure;

(c) Hindering, restraining, foreclosing and frustrating competition in the reconstituted lemon juice market;

(d) Increasing entry barriers in the reconstituted lemon juice market;

(e) Depriving consumers of the benefits of free and open competition. [5]

VII. VIOLATIONS

PAR. 11. Through each act or practice, hereinbefore alleged in Paragraph 9(a)–(f), respondent has maintained monopoly power over the production, distribution or sale of reconstituted lemon juice in the relevant market in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. Respondent, through unfair methods of competition, has restrained trade and maintained a noncompetitive market structure in the distribution and sale of reconstituted lemon juice in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

AUGUST 19, 1976

I

STATEMENT OF THE CASE

Allegations of Complaint

The complaint in this proceeding issued in July 1974 charging respondent Borden, Inc. with maintaining monopoly power over the marketing and [2] sale of reconstituted lemon juice through ReaLemon Foods, a unit of its Borden Foods Division, in violation of Section 5 of the Federal Trade Commission Act. More specifically, the complaint charged respondent Borden with using its dominant position, size and economic power to frustrate the growth of smaller reconstituted lemon juice marketers, to reduce their opportunities for survival, and to prevent, hinder and lessen competition in the

sale of reconstituted lemon juice. As a consequence of the foregoing and other enumerated acts and practices, respondent Borden was charged with (a) monopolizing the reconstituted lemon juice market, (b) preserving, maintaining, and furthering a highly concentrated market structure, (c) hindering, restraining, foreclosing, and frustrating competition in the reconstituted lemon juice market, (d) increasing entry barriers in the reconstituted lemon juice market, and (e) depriving consumers of the benefits of free and open competition.

The "relevant market," as indicated, was alleged to be the marketing and sale of reconstituted lemon juice in the United States and regions thereof. Industry sales of reconstituted lemon juice were stated to be approximately $25,000,000 in 1973, and respondent's ReaLemon brand was alleged to account for approximately 80 percent of such sales.

Borden's answer, filed August 22, 1974, denied all allegations of unlawful competitive conduct or that it had violated Section 5 of the Act. Respondent denied that reconstituted lemon juice was a relevant product market, that it had engaged in any of the specific acts and practices alleged, or that it had restrained trade or maintained a noncompetitive market structure in the sale of reconstituted lemon juice. [3]

Procedural History

Pretrial proceedings commenced shortly after the filing of Borden's Answer with a conference held August 28, 1974, and continued thereafter with extensive discovery and trial preparations by both sides. A number of motions were filed and ruled upon by the law judge, and several additional pretrial conferences were held to iron out various problems which developed. Hearings on the merits were originally scheduled for February 18, 1975, but that date proved to be impractical and they were reset for May 27, 1975. The case-in-chief commenced on that date in Chicago, Illinois, and thereafter hearings were held there and in Washington, D.C. and Los Angeles, California.

The trial required in all seven weeks of actual hearings, including rebuttal which was concluded on February 3, 1976. Many industry and other witnesses were called, and both sides presented extensive expert economic and marketing testimony. Complaint counsel called Dr. Michael Mann, Professor of Economics at Boston College and former Director of the Bureau of Economics of the Commission, and Drs. Warren Greenberg and Daniel P. Kaplan, economists from the Commission's Bureau of Economics. Respondent Borden called Dr.

William F. Massy, Professor of Business Administration and Vice-Provost for Research at the Graduate School of Business, Stanford University, and Dr. Morton Kamien, Professor of Managerial Economics at the Graduate School of Management, Northwestern University. In all 74 witnesses testified. When hearings were completed the transcript amounted to 6,189 pages, and twelve binders of exhibits had been accumulated numbering several thousand pages. The record was closed February 23, 1976. The initial decision was originally due May 21, 1976, but the complexity of this matter combined with another decision then being completed by the undersigned necessitated extensions of time which were granted by the Commission. [4]

The proceeding is now before the undersigned for decision based upon the allegations of the complaint, the answer, the evidence and the proposed findings of fact, conclusions and legal authority filed by both sides. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein, are rejected. The law judge, having considered the entire record, and all the contentions of respondent Borden and complaint counsel, makes the following findings and conclusions, and issues the order set out at the end hereof:

II

Findings of Fact

Respondent

1. Respondent Borden is a New Jersey corporation with its executive offices at 277 Park Ave., New York, New York. Among its divisions is the Borden Foods Division which is headquartered in Columbus, Ohio (Complaint and Answer, Paragraph Two; Dillon, Tr. 4840).

2. The ReaLemon-Puritan Company, based in Chicago, Illinois, was acquired by Borden in 1962, and thereafter has been operated as ReaLemon Foods, a separate unit of the Borden Foods Division. The principal product of ReaLemon Foods is ReaLemon brand of reconstituted lemon juice (Complaint and Answer, Paragraphs Three and Four).

3. Respondent Borden, Inc. is a major U.S. corporation with total sales of over $2 billion annually, total income after taxes of $66 million in 1972 and assets of around $1.3 billion. In 1973, total sales of ReaLemon Foods were approximately $28 million of which $22

million was reconstituted lemon juice (Complaint and Answer, Paragraph Four). [5]

4. At all times relevant herein, Borden has sold reconstituted lemon juice in various parts of the United States and was, and is now, engaged in "commerce" as "commerce" is defined in the Federal Trade Commission Act (Complaint and Answer, Paragraph Eight).

Market Definition

As a predicate for determining whether respondent Borden, as charged in the complaint, has "maintained monopoly power over the production, distribution or sale of reconstituted lemon juice," it is obviously necessary first to identify both the "relevant geographic market" and the "relevant product market."

Geographic Market

5. The geographic market within which to test the allegations of the complaint is the United States as a whole. Respondent Borden's ReaLemon bottled lemon juice is marketed nationally and competed with similar products in most of the country. Although valid geographic submarkets may exist, the record clearly establishes the existence and validity of a national geographic market (see, for example, CX 1, pp. 638–39; CX 2, pp. 660, 678, 707; CX 3, p. 740; CX 258).

Product Market

6. From the inception of this proceeding the composition of the relevant product market has been a paramount issue. Respondent Borden has contended throughout that any relevant market definition must include fresh lemons at a minimum. A major part of the case was devoted to documentary and testimonial evidence, some of it highly complex econometric analysis, on this issue. Complaint counsel, on the other hand, maintain that, although the "outer boundaries" of a broad product market may include [6] fresh lemons, a variety of practical factors, including product characteristics and "economic and commercial realities," establish that "processed lemon juice," described later herein, constitutes a valid submarket. After thorough consideration of the evidence and applicable legal principles on this question, the law judge, in accordance with the findings and reasoning set out hereinafter, has concluded that complaint counsel's contention is correct and that processed lemon

juice is, at the least, a proper submarket within which to test respondent Borden's competitive conduct.

Fresh Lemons

7. Little need be said about fresh lemons, they are known to all. Unlike other citrus fruit, however, fresh lemons are used mainly for their juice and as a garnish. Fresh lemons grow the year around, and are available at all seasons (Lee, Tr. 5079; Bohrens, Tr. 5071). California is a principal producer, although lemons are also grown elsewhere, including Arizona and Florida. Fresh lemons are perishable in a relatively short time. Estimates of the shelf-life of unrefrigerated lemons ranged from 5 to 7 days up to three or four weeks (Goldberg, Tr. 2630; Heller, Tr. 5018; Greenberg, Tr. 1202–1203; Imming, Tr. 4603), and under refrigeration at the proper temperature, six to eight weeks (Lemmerman, Tr. 981). Dollar sales of fresh lemons approximate $200,000,000 yearly (Fey, Tr. 3970).

Processed Lemon Juice

8. Processed lemon juice includes the following different varieties: reconstituted lemon juice, frozen reconstituted lemon juice, processed fresh lemon juice, frozen fresh lemon juice, and imitation lemon juice (Dr. Greenberg, Tr. 2801). As indicated earlier, the complaint alleged the relevant product [7] market to be "reconstituted lemon juice," but during the proceeding, and later in proposed findings and briefing, complaint counsel shifted to "processed lemon juice" which describes a slightly broader product market. Significant market share data is in terms of processed lemon juice (CX 239), although most of the evidence offered by complaint counsel relates to reconstituted lemon juice. Bottled reconstituted lemon juice, which is the product marketed by respondent under its ReaLemon brand, is overwhelmingly the dominant type of processed lemon juice, and comprises the bulk of the processed lemon juice category (see the testimony of Dr. Greenberg, particularly Tr. 2794 through 2806, Tr. 2846–47, CX 239, and CX 1 through 4 generally). Whether the relevant market is formulated in terms of "reconstituted lemon juice" or "processed lemon juice" makes no material difference in the outcome of this proceeding. Both of the foregoing terms, as well as "bottled lemon juice," were used to describe the industry in respondent's ReaLemon Marketing Plans (CX 1–4), and have been used in writing this decision.

9. Reconstituted lemon juice is manufactured by adding water, a preservative or preservatives, and lemon oil to pure lemon juice

concentrate which is purchased in bulk, often in tank cars, by large producers such as Borden. The ingredients are mixed according to a simple, well-known formula, using uncomplicated, relatively inexpensive equipment of the sort employed by any juice bottling operation (Hansfield, Tr. 132–135; Kendall, Tr. 535, 539; Wolcott, Tr. 635–636, 661; Delaney, Tr. 679–680; Peters, Tr. 1784–85). After manufacture, the product is packaged for consumer use in glass bottles ranging from 8 to 32 ounces in size (Hansfield, Tr. 2336; Kendall, Tr. 533–34; Delaney, Tr. 681, 693; Peters, Tr. 1785; Saving, Tr. 2510). In recent years a small volume has been marketed in plastic green or yellow lemon-shaped squeeze containers (Peters, Tr. 1786). [8]

A. Distinct and Unique Characteristics Differentiate Processed Lemon Juice from Fresh Lemons

10. Processed lemon juice has a variety of distinct and unique characteristics which differentiate it from fresh lemons.

Convenience

11. Processed lemon juice is readily, in fact, instantly, available for use as an ingredient for cooking or as an additive, as in the case of iced tea, for example. Borden's ReaLemon lemon juice may be kept for long periods in the refrigerator, up to six months or even a year (Lemmerman, Tr. 980; Goldberg, Tr. 2630; Greenberg, Tr. 1202). An ounce of ReaLemon bottled lemon juice is about the equivalent of the juice of one fresh lemon (CX 3, p. 753[1]), meaning that a quart bottle is essentially the equivalent, ready to use, of close to 32 fresh lemons.

12. Fresh lemons, in contrast, must be squeezed for use requiring time and work, and necessitating cleanup afterward. Additionally, since fresh lemons are perishable, they must be used within a relatively short time after purchase or allowed to go bad, and, if to be available when needed, must be constantly replenished.

13. ReaLemon over the years has promoted the advantage of its bottled lemon juice from the standpoint of convenience. As early as 1953, long prior to its acquisition by respondent Borden, ReaLemon emphasized in its advertising the convenience of lemon juice in a bottle over the trouble to the user of squeezing fresh lemons to obtain lemon juice (RX 192–194). This theme has been continued during intervening years to the present time. [9]

14. A few examples will convey the emphasis which ReaLemon

[1] Borden document numbers stamped on documents when turned over to the Commission's staff have generally been used in this decision to refer to pages within multi-paged exhibits.

gave in its promotional efforts to the convenience of bottled lemon juice over squeezing lemons for their juice. In an ad in *Readers Digest* in August 1956, ReaLemon showed a TV personality staging a contest over his "Breakfast Club" TV show demonstrating the time taken to squeeze enough lemons to provide the 16 ounces of lemon juice contained in that size of bottled lemon juice (RX 196, 215). Ads run in *Business Week, U.S. News and World Report,* and *Newsweek* during 1960 recounted the original founding of the ReaLemon company and the convenience of having ready-to-use lemon juice available in the kitchen without the time, fuss and bother of squeezing lemons (RX 198). Fifteen years later, in 1975, a program for national TV broadcasting featured the "convenience and availability" of ReaLemon over "produce," *i.e.,* fresh lemons (RX 546).

15. The convenience of processed lemon juice over fresh lemons has been generally recognized in the industry (Delaney, Tr. 689; Conrady, Tr. 3481; Crane, Tr. 3460; Fey, Tr. 3968; Foorman, Tr. 5046–48; Gordon, Tr. 3398; Rose, Tr. 4628; Silver, Tr. 3431; Toms, Tr. 3115; Wardell, Tr. 3304). The following are representative of the testimony of producers, brokers and distributors, and supermarkets. The Division Manager of the Product Sales Division of Sunkist Foods stated with respect to bottled or processed lemon juice that "basically you're working with a convenience item" (Delaney, Tr. 689). A Grand Rapids, Michigan, food broker testified that bottled lemon juice was differentiated from fresh lemons by "[c]onvenience primarily, because ReaLemon would stay in the refrigerator for months where fresh lemons would have to be used immediately on purchase or before they spoil in a short time" (Conrady, Tr. 3481). The Executive Vice President of a medium-size New York City area supermarket chain testified that "undoubtedly" [10] there was a "classification of consumers who will only buy the reconstituted product because of its convenience factor, no question about it" (Rose, Tr. 4628–29).

16. Purchasers and consumers believe bottled lemon juice to differ substantially from a convenience standpoint from fresh lemons. A survey by the Center For Advanced Marketing Practice, conducted in May 1972 for the ReaLemon Foods unit of respondent Borden, explored "consumers' attitudes toward usage of lemon juice—both packaged commercial and fresh" and reported the following, ReaLemon's bottled lemon juice being referred to as "commercial" (CX 286, p. 7682):

> The outstanding reason for use of the commercial lemon juice is convenience. First of all, it is always there. The housewife does not have to worry about having fresh

lemons on hand when she needs lemon juice, she does not have to make a special trip to the store when lemons are required, she does not have to keep lemons on hand that may spoil and get thrown away. The bottle stays in the refrigerator and is handy for any spontaneous use.

17. The corporate policies and marketing strategies of ReaLemon, as indicated, were based, among other factors, upon the advantage from a convenience standpoint of bottled lemon juice over fresh lemons. The ReaLemon Marketing Plan for 1973 stated (CX 3, p. 752):

Consumer Focus Group Sessions conducted in May 1972 in Chicago and New Jersey indicate that the user of bottled lemon juice is a convenience oriented consumer. [11] This is juxtapositioned against the fresh lemon user who is willing to sacrifice convenience for real/perceived flavor preference.

See also the ReaLemon Marketing Plan for 1974 (CX 4, p. 851).

Taste

18. There is a substantial, if not drastic, difference between the taste of reconstituted lemon juice and juice obtained from fresh lemons, differentiating these two products from each other. Respondent's 1972 Marketing Plan succinctly stated this fact (CX 2, p. 673):

Processed lemon juice is processed lemon juice and is not as good as the fresh equivalent in its taste qualities.

See also ReaLemon Marketing Plans for 1973 and 1974 (CX 3, p. 752; CX 4, p. 867). The latter noted that it was difficult to convert fresh lemon users to bottled lemon juice because they perceived "a great advantage in the taste of fresh lemons which far outweigh [sic] any convenience or economic factors."

19. The study prepared for respondent Borden by the Center For Advanced Marketing in 1972, already mentioned, evaluated a number of marketing factors bearing on bottled lemon juice. With respect to difference in taste between bottled lemon juice and juice squeezed from fresh lemons, the study informed Borden (CX 286, p. 7673):

The superior flavor of fresh lemon juice, the distasteful flavor of the commercial, is the chief reason for its use by the fresh users. The taste of the commercial is considered in no way comparable to the [12] fresh. The fresh is thought to be sweet and true tasting; the commercial is described as being different, imitation, funny tasting.

The foregoing conclusion was based on group interviews with a number of women. The group interview technique was utilized "to elicit spontaneous reactions from the respondents" (CX 286, p. 7657),

and the following specific comments of women interviewed were reported to Borden's ReaLemon management (CX 286, pp. 7673–74):

It's like night and day. You just can't compare the flavor.

I really mean the taste is so *very* different from fresh lemon. You just can't get the same taste synthetically that you do with something fresh. They are processing it. They've done something to it. It's not the same thing as the fresh.

It's nothing like a real lemon. It's like all the imitation products. It has a funny taste.

If I put the bottled lemon in tea I can't get the right flavor I want. If I use fresh lemon it's right any time.

When we make lemonade with the fresh, the lemons have a sweetness to it and we hardly have to use any sugar.

When it's fresh the flavor is stronger and truer and when it's canned or bottled the flavor is not the same.

It doesn't taste as good as fresh lemons. It really doesn't. It has a strong acidy taste. [13]

The fresh lemon is not as bitter. The bottled is stronger, more tart.

I think the concentrated is a little strong. It's a little different taste. Fresh lemon is the real lemon. I don't know what they put in the bottles but it makes it a little different.

I can take a slice of fresh lemon and eat it but I can't drink lemon juice from a bottle of reconstituted. It's much too tart and there's a bitterness to it. A fresh lemon has the tartness but not the same *strong* tartness.

It's bitter whereas a lemon is sour.

I made lemonade with the bottled stuff and the children wouldn't drink it. It was too strong.

Fresh lemons make a better lemonade but of course it's not as convenient. It's fresher tasting, not quite as tart.

It has a canny taste, a tin taste. It leaves an aftertaste in your mouth.

Most bottled things have chemicals added to it [sic] and you pick that up, the chemical taste.

The industry recognized the substantial difference in palatability of bottled lemon juice and lemon juice squeezed from fresh lemons (see Imming, Tr. 4603; Fey, Tr. 3969; Crane, Tr. 3466; Foorman, Tr. 5047; Robison, Tr. 5029; Heller, Tr. 5017). [14]

Shelf-life and Spoilage

20. As already stated, bottled lemon juice and fresh lemons are

very different products from the standpoint of freedom from spoilage. Fresh lemons are perishable commodities, and spoil within a relatively short time depending upon conditions (Heller, Tr. 5018; Goldberg, Tr. 2630; H. Greenberg, Tr. 1203; Lemmerman, Tr. 980; Rose, Tr. 4629; RX 314).

21. In contrast, bottled lemon juice may be kept for a year or more without spoiling (Peters, Tr. 1790).

Lack of Utility for Certain Uses

22. Processed lemon juice cannot be used for many of the purposes for which the public uses fresh lemons. When a restaurant or housewife wishes to garnish a dish with a slice of lemon, to present a beverage or iced tea with a lemon wedge, or to decorate a drink with a twist of lemon peel, obviously fresh lemons must be used (see Robison, Tr. 5022, 5026-27; Toms, Tr. 3112-13; Swartzberg, Tr. 2997; Edelman, Tr. 3230; Thomas, Tr. 3271; Lundell, Tr. 3360-61; Fey, Tr. 3959; Silver, Tr. 3431; Conrady, Tr. 3480; Bentley, Tr. 3288; Rose, Tr. 4628; CX 286, p. 7669).

23. In the restaurant industry, fresh lemons are commonly used in serving meals and beverages because of the visual appeal to the patron, which processed lemon juice cannot supply (Robison, Tr. 5032; Lundell, Tr. 3334-35; Bentley, Tr. 3289; Edelman, Tr. 3236; Stipulation, Tr. 6200; Massy, Tr. 5254). Similarly, householders, or some of them, use fresh lemons on occasions where appearance is important. The survey conducted for respondent by the Center For Advanced Marketing Practice found this to be true, reporting to respondent (CX 286, p. 7679): [15]

Commercial lemon juice is generally not considered appropriate for company. Even those who might use the bottled for their own tea, feel that fresh lemon should be used for entertaining because it looks nicer.

Presence of Additives in Bottled Lemon Juice

24. Bottled lemon juice contains additives which prevent spoilage and impart to the product the long shelf-life of a year or more mentioned earlier. The preservatives used have at times been 3/100ths of 1% sodium benzoate and 1/40th of 1% sodium bisulphite (RX 238-239). At other times, 1/30th of 1% sodium bisulphite (RX 248) and 1/50th of 1% sulphur dioxide have been used (RX 251). The presence of these additives, particularly sulphur dioxide, substantially differentiates bottled lemon juice from the juice from fresh lemons. Borden's ReaLemon president wrote in the 1972 Marketing Plan (CX 2, p. 674):

The biggest potential problem facing REALEMON, aside from competition, is the use of Sulphur Dioxide as a preservative, as mentioned earlier. While the level used in the juice could not be considered in itself harmful, there has been considerable adverse publicity given to Sulphur Dioxide in the past couple of years, as people's awareness of air pollution has grown. Should they identify our preservative as being one and the same with the gas present in the air, we could have problems. Sulphur Dioxide does have, if nothing else, a very obnoxious odor, and yet at the same time, based on our own [16] experience as well as a two-year study by the Syracuse Research Centre, is the only preservative that works effectively on lemon juice. If we were unable to continue using it, we would not have a product that could be considered satisfactory to the consumer.

B. Substantial Retail Price Differences Prevail Between Processed Lemon Juice and Fresh Lemons

25. Very substantial price differences prevail between processed bottled lemon juice and lemon juice obtained from fresh lemons. The ReaLemon Marketing Plan for 1973 stated that juice from fresh lemons cost between three (3) and five (5) times as much as ReaLemon bottled lemon juice (CX 3, p. 753). Since respondent's ReaLemon lemon juice commands a premium price, as discussed later in this decision, the cost to the public of juice from fresh lemons was relatively even greater in the case of other brands of bottled lemon juice. For example, the 1973 Marketing Plan of respondent reported that the most recent Nielsen survey found a 17¢ price differential between ReaLemon and another brand of processed lemon juice (32 oz. size). Based on this figure, fresh lemon juice cost four (4) to seven (7) times more per ounce than non-premium bottled lemon juice (CX 3, p. 753). Respondent's labels state that an ounce of ReaLemon lemon juice is the equivalent of one fresh lemon (RX 238–266), and ReaLemon's chief executive testified to this effect (Peters, Tr. 4570).

26. In 1975, as an adjunct to nationwide TV advertising, respondent distributed brochures to the retail food industry which stated (RX 546, p. 6):

In a recent National survey [Nielsen], Dec. 11, 1974 to Jan. 3, 1975, the [17] price of fresh lemons averaged out at 12.3¢ each. (One lemon has about one ounce of juice depending upon the size—storage time—type—season, etc.)

The average price per ounce for REALEMON came to 2.8¢ per ounce.

12.3¢ for fresh lemons
2.8¢ for REALEMON

and the juice is extracted for her. . .it's available when she needs it. . .in volume. . .for her cooking-baking, tea, fish, salads, and many household uses. . . .

Based on the foregoing, the cost of fresh lemon juice was about four

(4) times the cost of respondent's ReaLemon, and correspondingly more than the cost of competing brands of bottled lemon juice.

27. Promotional literature used by respondent Borden stated in the late 1960's that "the lemons you'd squeeze to fill a quart bottle of ReaLemon would cost about 5 times as much" (RX 375; Lundell, Tr. 3157). Again, the lower price of other bottled lemon juices would have produced a correspondingly more expensive figure for fresh lemon juice.

28. Fresh lemons fluctuate in price on a weekly, or even, at times, a daily basis. The Executive Vice President of a supermarket chain in the New York City area testified that the price of fresh lemons fluctuated, as follows (Rose, Tr. 4623–24):

> . . . probably, on a week-to-week basis. A lot depends on not only the supply available from the field but the supply in transit to any given area at [18] any given time, or the cold storage holdings that might be involved in any given area or any given time.
>
> As a witness previously pointed out, the supermarket is nothing more than a transitory place. It is a place where products are stored for resale, and the hope is that it is a very immediate resale especially on the perishable products so that we would hope to turn lemons over twice a week, I would guess, so you would hope never to have lemons on hand for more than three or four days at any given time.
>
> If there is a large glut on the market of lemons, in a market, if there is a large supply of lemons in the market at any given time, the price is going to go very, very low. If lemons, for some reason, as a produce buyer told me, if a train company can't get through to New York, the price of lemons would go sky high in one day. It is very difficult to say.

In contrast, the price of bottled lemon juice changes at infrequent intervals, there being, for example, only one or two price increases on ReaLemon between 1970 and 1974 (CX 37–54).

29. Notwithstanding the large price differential between fresh lemons and processed lemon juice, the two products continued side-by-side in the marketplace, and $200,000,000 or more worth of fresh lemons continued to be sold annually, as stated earlier, many times the volume of processed lemon juice (Fey, Tr. 3970). Fresh lemons, in short, have not been driven from the marketplace. This circumstance alone is [19] strong evidence that fresh lemons and processed lemon juice are not in the same relevant market. As Dr. Mann testified (Tr. 6130, 6186–87):

> It seems to me that any product that sells at a quarter of the price of the other, and yet, doesn't sweep it out of the marketplace and, in terms of purchasing, shifting to other purchasers, it is so difficult for me to believe that the two products are viewed as very close substitutes even when I look at it in that kind of common-sense way.

* * * * * * *

Q. Does the erosion of the market which was said to exist for ReaLemon after the entry of a low priced seller demonstrate to you that no other product competes with bottled lemon juice but another bottled juice?

A. Well, it is very supportive because another bottle of lemon juice comes in and has an impact on the market which leads to response on the part of ReaLemon, and it affects the market shares and it affects price behavior, but in the case of lemons versus reconstituted lemon juice, you have a price differential, a substantial price differential, reconstituted lemon juice being in the neighborhood of one quarter of the equivalent juice content of lemons and yet, lemons aren't driven out of the marketplace.

There seems to be no concern on the part of the marketers of lemons that the [20] price differential is unsustainable, without worry, that they are going to find themselves with nobody to sell to.

Q. Could a price differential that large be explained by quality and taste perception differences by consumers?

A. I suppose it could, but it would suggest to me that taste and quality differences were so extensive that they are really separate commodities.

C. Processed Lemon Juice Producers Priced Their Product in Competition with Competing Brands of Processed Lemon Juice—Not Fresh Lemons

ReaLemon

30. In pricing its processed lemon juice respondent Borden focused its attention on the prices of other brands of processed lemon juice, writing in its 1971 Marketing Plan that because of the inroads of competition "starting in 1970" price increases appeared to be "out of the question" (CX 1, p. 645). The plan went on to state that the spread between the price of respondent's ReaLemon processed lemon juice and competitive brands, 15¢ to 20¢ per unit, precluded any possibility of price increases to offset higher costs (CX 1, p. 649). The 1972 Marketing Plan observed that ReaLemon commanded a premium over "competitive offerings" as high as "25 to 30 cents per unit" (CX 2, p. 665) but noted that the most serious threat was the "low priced competition" (CX 2, p. 671). The 1973 Marketing Plan referred to the same problem stating that "new distribution" had been secured by "competitive brands" at the retail level, that "price sensitivity" had been exhibited at the consumer level, and that this "may be the [21] single most important area of the 1973 ReaLemon Plan" (CX 3, p. 781). The 1974 Marketing Plan noted that the "stability of the ReaLemon franchise" was significantly endangered by Golden Crown, "a price oriented competitive brand" (CX 4, p. 853). The plan reviewed the price spread between ReaLemon and Golden Crown processed lemon juice throughout the United States (CX 4, p. 873), and stated that price increases were planned to compensate for cost increases, but only outside "the highly competitive Golden Crown markets concentrated in Region 1 and part of Region 2" (CX 4, p. 873).

31. Respondent Borden's ReaLemon Foods did not gear its promotions to compete with fresh lemons, but to compete with other

processed lemon juice brands. The 1971 Plan, after listing dollar amounts for the years 1967 through 1970 for advertising and promotions, the latter increasing relative to the former, stated (CX 1, p. 646):

The figures reflecting a considerable change in the ratio of advertising to promotion are in direct relation *to the advent of competition starting in 1967.* [Emphasis added.]

By "competition" in the foregoing quotation Borden manifestly referred to other processed lemon juices inasmuch as fresh lemons have always been marketed. The 1972 Marketing Plan stated (CX 2, p. 700):

REALEMON'S trade promotions can be considered most effective, as they generate considerable volume at the time they are being presented. In addition, this now has become an important tool in dulling the efforts of competition who are priced from 20 to 30 cents per bottle less than REALEMON, at those times when REALEMON is not being promoted.

[22] The 1973 Marketing Plan noted three major opportunities for improving performance in 1973, among them the following (CX 3, p. 817):

The use of market-by-market deal levels with higher levels in competitive markets than now.

The "basic plan" envisaged different promotional payments in "highly competitive," "moderately competitive" and "low competitive" markets (CX 3, p. 828), indicating that other processed lemon juice brands were the competitive concern of Borden's ReaLemon management, not fresh lemons. See also, in this connection, CX 4, p. 858. That promotional payments were geared to compete with other brands of processed lemon juice rather than fresh lemons was confirmed by industry members. An Iowa food broker testified (Wardell, Tr. 3313):

Q. Did ReaLemon ever offer promotions in regard to reduced prices on fresh lemons?

A. In regard to reduced prices on fresh lemons?

Q. If there was a special being offered for the sale of fresh lemons, Mr. Wardell, did the ReaLemon Company respond to that with one of their own promotions?

A. No, sir.

The Grocery Buyer for a large Texas supermarket chain testified (Thomas, Tr. 3274): [23]

Q. From your knowledge, Mr. Thomas, did the ReaLemon Company ever alter their promotions or offer new promotions due to the price changes of fresh lemons?

A. No, I can't honestly say that they ever initiated changes because of the prices of fresh lemons.

To the same effect see Sherry, Grocery Buyer for a Midwest chain of supermarkets, Tr. 3416; Conrady, a Grand Rapids food broker, Tr. 3486–87.

32. The lack of sensitivity between fresh lemon prices and sales of processed lemon juice is indicated by the following testimony of the ReaLemon Foods' president (Peters, Tr. 4557):

Q. If fresh lemon prices are up this year as you indicated, have you noticed what kind of trend, if any, there has been in the sale of reconstituted lemon juice?

A. They remain flat. I'm at a loss to understand why, but we could either assume that advertising is ineffective or competition is really chewing us up.

Q. How about reconstituted lemon juice sales as a whole, not just ReaLemon?

A. They also have been pretty flat.

Other Processed Lemon Juice Marketers

33. Other processed lemon juice marketers priced their brands in competition with other processed lemon juice brands, particularly ReaLemon, [24] not fresh lemons (Kendall, Tr. 546–47; Westcott, Tr. 615–16; Wolcott, Tr. 649; Delaney, Tr. 686–89; Hansfield, Tr. 158–59, 161, 2344). Fluctuations in the retail price of fresh lemons had little or no effect upon the price of bottled or processed lemon juice. The manager of the Product Sales Division of Sunkist Foods testified (Tr. 689):

Q. Mr. Delaney, is there considerable price interaction between fresh lemons in the supermarket and reconstituted lemon juice?

A. In my opinion, no.

The president of another regional producer of processed lemon juice testified (Kendall, Tr. 546):

Q. Is there a close correlation between retail fresh lemon prices and retail processed lemon juice prices?

A. Do you mean, do they move up and down together or apart, this sort of thing? No. [Processed] Lemon juice prices are primarily, as I said earlier, predicated on cost and promotions, et cetera.

The president of Golden Crown processed lemon juice testified (Tr. 157):

Q. Mr. Hansfield, the day to day selling of Golden Crown Reconstituted Lemon Juice, with whom are you in competition?

A. The primary competitor in the reconstituted lemon juice is Real Lemon. I mean, they are the market. [25]

Q. In day to day sales procedures, are you in competition with fresh lemons?

A. No. We give no credence to fresh lemons at all.

The Sales Manager of a regional brand of bottled lemon juice testified (Wolcott, Tr. 616):

If fresh lemons went down considerably we would not adjust the price of lemon juice to meet that competitive situation. No, we wouldn't.

D. Retail Food Store Buyers Placed Orders for Processed Lemon Juice Without Regard for the Prevailing Price of Fresh Lemons and Vice Versa

34. Retail grocery and supermarket buyers did not consider the price of fresh lemons in making decisions on the purchase of processed or bottled lemon juice for resale. The grocery buyer for a Wisconsin chain of 80 retail food stores testified (Ellenson, Tr. 1963):

Q. Mr. Ellenson, in making buying decisions concerning ReaLemon lemon juice, do you consult the price and quantity information concerning fresh lemons at Godfrey stores?

A No, sir.

Q. Why not?

A. It's two different worlds you're talking about, a concentrate against the pure natural product. [26]

The head buyer for one of the nation's largest supermarket chains, Acme Markets, Inc., testified (Moreland, Tr. 1024–25):

Q. While you were in the position of head buyer, did you discuss on a regular or on any kind of a basis with the produce buying department purchases of lemons or the price of lemons in making your decisions concerning ReaLemon lemon juice purchases?

A. No.

The head of the Grocery Division of another large supermarket chain, Penn Fruit, testified (Greenberg, Tr. 1190):

Q. Do you consider the price or the instore movement of fresh lemons when you purchase reconstituted lemon juice?

A. No. We have no conversations with the Produce Department. They do their own merchandising.

The Grocery Buyer Merchandiser for still another supermarket chain, Food Fair Stores, with supermarkets throughout the East Coast, testified to the same effect (Friedland, Tr. 1494):

Q. Do you ever consider the price or instore movement of fresh lemons when you purchase reconstituted lemon juice?

A. No.

Q. Do you feel these 2 products compete with each other? [27]

A. No, I don't.

The head buyer for a Pennsylvania Grocery Cooperative testified similarly (Leahy, Tr. 850):

Q In determining the quantity of lemon juice that you purchase, do you, in any way, consult the price of fresh lemons in your member stores or the quantity of lemons in your stores?

A. No. When you come right down to it, they are two different products.

The Director of Grocery Purchasing for Giant Food, Incorporated, a large chain of supermarkets in the Baltimore-Washington-Richmond area, did not believe there was any price sensitivity from the consumer's standpoint between fresh lemons and bottled lemon juice, and did not think the price of fresh lemons affected the price of bottled lemon juice (Manos, Tr. 1521–22). This supermarket official stated (Tr. 1522):

If lemons are priced high, I don't think that a customer who is normally buying lemon juice, buying lemons, would rush over to buy lemon juice, necessarily, nor do I believe if lemons were being given away at a low price, would they stop buying [bottled] lemon juice.

See also to the same effect Gerace, head merchandiser for the leading supermarket chain, Tops Markets, in the Buffalo, New York, area, Tr. 2032; Goldberg, Director of Grocery Purchasing for a 187 member retailer-owned cooperative, Tr. 2628–29; Lemmerman, Vice-President in charge of grocery purchasing for a 104 store supermarket chain, Supermarkets General, [28] serving six states in the Northeast, Tr. 973–75; Springer, a purchasing agent for a Buffalo, New York, grocery wholesaler, Tr. 1862; Bentley, a Houston, Texas, food broker, Tr. 3294; and Silver, a Pittsburgh, Pennsylvania, food broker, Tr. 3434.

35. Conversely, the retail food store produce buyer of the largest or second-largest supermarket chain in the United States did not give consideration to the current price of processed lemon juice on the shelves of the chain's stores when placing orders for fresh lemons. The National Director of Produce Merchandising for the A&P testified (Watson, Tr. 6203):

Q. In making your decision as to what demand or how many fresh lemons to buy, did you consult the grocery buyer, check his supply or his price of [bottled] lemon juice?

A. No.

E. In Their Business Operations Respondent Borden's ReaLemon Management, Sales Personnel and Brokers Considered Pro-

cessed Lemon Juices and Brands Thereof To Be the Competitive Product Market

Marketing Plans

Respondent Borden's ReaLemon Foods prepared annual "Marketing Plans," referenced and quoted from earlier herein, in the fall of each year to chart business courses for the ensuing year. These are reliable business records, written by management. After revisions and redrafting, and discussion with Borden headquarters' executives, they were issued [29] by the ReaLemon Foods president for planned ReaLemon marketing the following year (Peters, Tr. 1754–55). Marketing Plans for 1971, 1972, 1973 and 1974 are in the record as exhibits (CX 1–4).

36. Although the advertising efforts of ReaLemon over the years have been geared to persuading the consuming public that the unique characteristics of bottled lemon juice, already discussed, for example, convenience, economy, relative non-perishability, etc., justified its use instead of fresh lemons, Borden management looked upon other processed lemon juice brands as constituting the competitive product market, not fresh lemons. This is revealed clearly in the Borden ReaLemon Marketing Plans for the years 1971 through 1974 (CX 1–4).

37. In 1971, viewing the competitive situation, Borden's ReaLemon management noted that its market share of processed lemon juice nationally was 92 percent at the beginning of 1970, but had slipped to 88.2 percent by August of that year. Although concluding that this loss was not great, the Marketing Plan pinpointed certain key markets as "danger spots." Milwaukee, St. Louis, Buffalo, Chicago, Cincinnati, Dayton and Columbus were identified as "now" having "Golden Crown Brand Lemon Juice for competition." Philadelphia was described as "under the siege" of competition from Seneca, another regional bottled lemon juice producer. Looking at the situation generally, the Marketing Plan observed (CX 1, p. 640):

> There are presently 10–12 competitors vieing for the bottled lemon juice business. Of these, three are presently causing the most difficulty, Golden Crown, Seneca, and Tropic Fresh.

The latter was a Florida producer which had "attained modest success in the Southeast." The Marketing Plan went on to note (CX 1, p. 642): [30]

> ReaLemon's other competition, while many in number, has not been of major proportions although it does include big names such as Sunkist and Vitapakt.

Both of the latter are brands of bottled lemon juice sold in California and the Southwest. In calculating its "market" share, Borden used the bottled or processed lemon juice industry, not that industry's sales *plus* fresh lemon sales.

38. The 1971 Marketing Plan states that in the past ReaLemon bottled lemon juice had been the "total market," that media and promotional expenditures had been highly successful in attracting new users and increasing uses with present buyers, and that the long range objective was to expand the size of the "total market," as follows (CX 1, p. 649):

> . . . ReaLemon has now become a protective umbrella over all lemon juice activity. The long range objective therefore, is to expand the size of this umbrella and thus the total market.

The "total market" in the ReaLemon view was thus processed lemon juice.

39. The short range objective given in the 1971 Marketing Plan was to prevent the price spread between ReaLemon bottled lemon prices and those of competitors "from increasing," in order to preserve respondent's "market share close to its present level" (CX 1, p. 649):

> Market share is the key, since industry or total market growth will be reflected more toward ReaLemon than its competitors by virtue of ReaLemon's present 90% market share. [31]

40. Turning to sales and profits, the 1971 Marketing Plan viewed other processed lemon juice marketers as ReaLemon's competition, rather than fresh lemons. Borden's 1971 Plan stated (CX 1, p. 645):

> Prior to the time of serious, effective competition, ReaLemon had been able to raise prices in direct proportion to costs and its desire to increase profits.

Further:

> Starting in 1970, when competition began to make serious inroads into ReaLemon's market share as a direct result of attacking in the most vulnerable area, price, further price increases appear to be out of the question. The whole issue is further complicated by the current problem of consumerism. With the cost of living going up as it has, many advertised brand names are being passed up in favor of cheaper, unknown offerings. Retailers are taking on items competitive to ReaLemon, and now the consumer, much more aware of costs/values, may be hesitant about spending 15–20¢ more per unit.

The Marketing Plan stated that in contrast to prior years the spread between the price of ReaLemon bottled lemon juice, and the prices of

competing bottled lemon juices, precluded "any possibility of price increases to offset higher costs" (CX 1, p. 649).

41. Discussing promotional pricing activity the 1971 Marketing Plan stated that ReaLemon again would be specifically attacking the problem of the retail price spread between ReaLemon and competition, and [32] noted that in "general terms, competitive activity exists in the Eastern half of the United States" (CX 1, p. 656). Promotional pricing was planned to amount to as much as $1.20 per case, or 10¢ per bottle in the East but limited to "60 to 75 cents per case" in the West (CX 1, p. 657).

42. From the foregoing, it is evident that respondent Borden's ReaLemon management did not look upon the product market within which it operated as including fresh lemons, but only other bottled and processed lemon juice products. Because of the fact that fresh lemons are marketed nationally in a dollar volume far greater than processed lemon juice, it is obvious that, if fresh lemons were in truth a component of the product market along with processed lemon juice, respondent Borden would not have had the market power prior to 1970 "to raise prices in direct proportion to costs" and "its desire to increase profits" (CX 1, p. 645). It is additionally evident that if fresh lemons were a component of the product market within which Borden's ReaLemon brand of processed lemon juice competed, Borden management would not, and could not have written that "[i]n general terms, competitive activity exists in the Eastern half of the United States" (CX 1, p. 656). Further, Borden could not realistically have engaged in dual geographic levels of promotional pricing, using $1.20 per case in the East and a much smaller figure "60 to 75 cents per case" in the West (CX 1, p. 657).

43. Similarly, the 1972 Marketing Plan viewed Borden's product competition to be other processed lemon producers. Although Borden's ReaLemon president continued the historic approach of ReaLemon of looking upon fresh lemon users as a source to convert to the use of bottled lemon juice by stressing "ease, convenience and economy," other brands of processed lemon juice were regarded as the day-to-day [33] product competition (CX 2, pp. 682–684). As a prelude to evaluating competition faced by ReaLemon bottled lemon juice, ReaLemon Foods' president wrote with respect to the "market" in which ReaLemon operated (CX 2, p. 669):

> Historically, REALEMON has been the market in the sales of processed lemon juice. At the present time with a 90% market share, REALEMON can still be considered the market.

Identifying competition, Borden's ReaLemon president then stated along the lines of the 1971 Plan just quoted (CX 2, p. 671):

> REALEMON presently has in excess of 10 competitors, three of whom have been causing real problems. These are Golden Crown, Seneca, and Tropic Fresh.

Further (CX 2, p. 674):

> Our competition has restricted its efforts for the most part, to the 32 ounce or quart size, which has been our feature size in the major metropolitan areas of the Northeast and North Central. The gains they have made thus far have been largely at one another's expense, although they have captured a segment of our market as well. Should they expand their efforts into a full array of sizes, our problems could begin to multiply at a more rapid rate.

44. Promotional efforts to maintain ReaLemon as the "featured brand at the retail level" (CX 2, p. 679) were directed at competing processed lemon juice producers, not fresh lemons. When respondent Borden's 1972 ReaLemon Marketing Plan noted that since "competition" was priced "far under us," it obviously referred to other brands of bottled lemon [34] juice, as it did when it referred to ReaLemon's trade promotions as having "now become, in addition to their other features, a tool or lever against competition" (CX 2, p. 688). Likewise, when respondent's ReaLemon president stated in the 1972 Plan that a national advertising program was necessary to strengthen ReaLemon's position in those markets where "competition" had made "sizeable inroads," the reference was to competing processed lemon juice brands (CX 2, p. 688).

45. The "Basic Platform" of ReaLemon's promotional efforts announced in the 1972 Plan was to use three annual promotions "off-invoice" to cause supermarkets to feature ReaLemon, and to "narrow the gap between competitors prices and our own" (CX 2, p. 690). The 1972 Marketing Plan further stated (CX 2, p. 690):

> The consumer faced with the dilemma of buying an unknown, untried brand, but nevertheless offered at prices far below that of REALEMON, must be persuaded and motivated to continue buying the No. 1 brand.

Again, the target of these references was not fresh lemons, but competing brands of processed lemon juice.

46. The 1973 ReaLemon Marketing Plan (CX 3), like the Plans for prior years, did not look upon the "market" as consisting of both processed lemon juice and fresh lemons, and respondent's management did not consider and calculate ReaLemon's market share as a percentage of such a market. Instead, the 1973 Plan, as prior Plans, viewed the product "market" to be processed lemon juice, and the competitive problem the maintenance of ReaLemon's [35] historic

dominance in that market with approximately 90 percent of sales. As before, although the objectives of respondent's advertising strategy included enlargement of the overall processed lemon juice market by conversion of fresh lemon users to the use of ReaLemon (CX 3, pp. 787–88), the purpose or aim of respondent's specific promotions was directed at competing processed lemon juice producers (see, for example, CX 3, p. 792).

47. The 1973 Marketing Plan stated (CX 3, p. 738):

> During 1972 the competitive environment in the lemon and lime juice category has been significantly altered versus previous years. A comparison of SAMI data between 1971 and 1972 indicates the emergence of Golden Crown as the dominant factor within this segment.

Looking at the "competitive position" of the ReaLemon brand of bottled lemon juice, the 1973 Plan referred to the distribution inroads made by Golden Crown (CX 3, p. 767), and then identified other processed lemon juice brands in various areas (CX 3, p. 768):

> *Other Competitive Brands*
>
> All other competitive products tend to have regional distribution with the major areas as follows:
>
> (1) SENECA - New York City, Philadelphia, Baltimore/Washington, Norfolk and Cleveland
>
> (2) SUNKIST - Los Angeles, San Francisco and Phoenix [36]
>
> (3) VITA PAKT - San Francisco, Los Angeles, Phoenix and Philadelphia
>
> (4) TROPIC FRESH - Miami, Tampa, Jacksonville and Atlanta.

The failure to identify fresh lemons, or marketers thereof, in the foregoing review is significant.

48. ReaLemon's 1973 objective was to regain one-half of the "share loss in 1972" (CX 3, pp. 750, 759). The market share of competitors was reviewed in the 1973 Plan as of the situation August 4, 1972. In this portion of the 1973 Plan the competition was listed as Golden Crown, Seneca, Sunkist, Vita Pakt, Treesweet, and "All Others" (CX 3, p. 759). The market, thus, was again viewed as being made up of processed lemon juice producers, not those producers *and* fresh lemons.

49. Under the heading "Competition," the 1973 Marketing Plan of ReaLemon analyzed the national market in terms of other processed lemon juice producers, and a number of metropolitan and regional markets in terms of the share obtained by another bottled lemon juice producer, Golden Crown (CX 3, pp. 759–61). The strategy

of the latter firm was considered, and under "Other Competitive Brands," it was stated "there is no significant activity. . ." (p. 764).

50. Considering "Distribution—Key Account and Retail," the 1973 Marketing Plan stated (CX 3, p. 767):

> The lemon juice market has three major characteristics:
>
> (A) ReaLemon is the only nationally distributed product. [37]
>
> (B) Competitive brands are offered nationally however in general, with the exception of Golden Crown, secure regional distribution.
>
> (C) Golden Crown is expanding nationally as a function of:
>
> (1) Success in 1972 in terms of absolute sales and sales per store handling.
> (2) Increased manufacturing capacity.

Fresh lemons were not mentioned. Obviously they are "nationally distributed." It is clear that in making plans for 1973 ReaLemon management again viewed processed lemon juice as the "market" and other producers of processed lemon juice as the "competition."

51. For 1973, ReaLemon's management determined to continue the use of "Trade Promotions" to combat competition, and these were directed at other bottled lemon juice brands. The 1973 Plan stated (CX 3, p. 781):

> Trade deal activities have become an increasingly important tool at both the retail and consumer level. At the retail level new distribution has been secured by competitive brands and at the consumer level there has been exhibited a high degree of price sensitivity. This may be the singly most important area of the 1973 ReaLemon Plan.

Trade strategy was to be concentrated "in heavily competitive markets with low or moderately competitive markets receiving less weight" (CX 3, [38] p. 787). The ReaLemon plan was to retrieve in 1973 half of the market share, from 91.8 percent to 88.0 percent, lost between 1970 and 1972 to competitive processed lemon juice producers. This gain was to be achieved against "all brands other than ReaLemon" (CX 3, pp. 759, 790–91).

52. As already noted in connection with ReaLemon promotional payments, the 1973 Marketing Plan recognized three categories of markets, " HIGHLY COMPETITIVE," "MODERATELY COMPETITIVE," and "LOW COMPETITIVE" (CX 3, pp. 838–39). These categories referred to processed lemon juice, and took no account of fresh lemon sales or prices (see Peters, Tr. 1812–13).

53. The 1974 Marketing Plan likewise viewed the product market as processed lemon juice and the competitive threats to emanate from other processed lemon juice brands, particularly Golden Crown

(CX 4). To a somewhat greater degree than the 1973 Plan, respondent's 1974 Marketing Plan focused on the inroads made by Golden Crown on the ReaLemon market share. Plans and programs were made to retrieve lost ground, and to prevent future growth of Golden Crown. Under "REALEMON PERFORMANCE/COMPETITIVE BRANDS," the 1974 Marketing Plan stated (CX 4, p. 853):

> The stability of the ReaLemon franchise is significantly endangered by the presence of Golden Crown, a price oriented competitive brand. However, it must be noted that Golden Crown simply highlights the vulnerability of ReaLemon to this form of competition whether it be a branded item or private label.

By "ReaLemon franchise" was meant the historic dominance of the ReaLemon brand of bottled lemon juice, and the consumer's acceptance of that brand [39] as virtually synonymous with bottled lemon juice. Pricing was considered to be the "major Golden Crown competitive tool" (CX 4, p. 854). Retailer margins were noted as important since margins affected Golden Crown's ability to "secure distribution, shelf space, display and feature activity" (CX 4, p. 855).

54. ReaLemon's marketing activities in 1973 were dominated by the shift from selling through brokers to marketing by respondent's own sales force, and by the development of a creative strategy to strengthen the consumer "franchise" and expand the category, that is, sales of all processed lemon juices. A third objective determined upon was (CX 4, p. 856):

> The attempt to forest all the growth (in established markets) and the expansion (in new markets) of Golden Crown through more aggressive trade oriented activities.

55. The objectives of Borden's ReaLemon management for 1974 included an increase in the ReaLemon "market share" in "4 key Districts," New York, Philadelphia, Chicago and Detroit, and an increase in those metropolitan areas of "total category growth" from an estimated "normal" 4 percent to 10 percent, and to 7 percent in the rest of the United States (CX 4, p. 864). As before, market share was calculated on the basis of processed lemon juice sales, not including fresh lemon sales.

56. According to respondent's 1974 Marketing Plan prices were to be increased in markets accounting for 50 percent of total volume, but not increased in the "highly competitive" Golden Crown markets concentrated in Region 1 and part of Region 2 (CX 4, p. 873). In making the foregoing determination [40] to raise prices on ReaLemon processed lemon juice only in markets other than the "highly competitive Golden Crown markets," Borden's 1974 Marketing Plan again gave no consideration whatever to fresh lemons or their prices

(CX 4, pp. 873–874). Importantly, inasmuch as fresh lemons are marketed nationally, the ability of respondent to raise prices in those geographic areas where half its volume was obtained, and not in other geographic areas accounting for the remaining half, would seem to be strong evidence that the product market in which Borden's ReaLemon processed lemon juice competed did not include fresh lemons.

Day-to-Day Competitive Activity

57. The record contains a substantial volume of internal ReaLemon correspondence, memoranda, and communications between respondent's executives, sales personnel, brokers and others handling ReaLemon processed lemon juice. In these documents, the competitive conditions in the marketplace were of principal concern, and the competitive activities of respondent's ReaLemon Foods in the marketing of processed lemon juice were detailed. There is no question from this material that the product market was looked upon to consist of other brands of processed lemon juice, not including fresh lemons. In over 200 pages of documentation (CX 81) showing the monitoring of competitive products, nothing but the activities of other brands and producers of processed lemon juice were given significant attention. Such documentation covered the metropolitan areas of New York, Philadelphia, Pittsburgh, Chicago, Tampa, Detroit, Miami, Los Angeles, San Francisco, Seattle, Phoenix, Minneapolis-St. Paul and Houston during the years 1971 through 1974 (August). Among these competitive reports are reports of ReaLemon regional sales managers to Borden's National Sales Manager at [41] ReaLemon headquarters, naming the competitive products encountered in their areas. The following were named, all of which are processed lemon juices:

Golden Crown	Sunkist
Seneca	Kimball
Reddi-Lemon	Tree Sweet
VitaPakt	E Z Juicer
Tropic Fresh	M C P
Eclipse	Iris

See CX 81, pp. 7425–7434. Private label brands were also mentioned.

58. The fact that Borden's ReaLemon management viewed other brands of processed lemon juice as the competitive products, and not fresh lemons, can further be seen in a letter of January 16, 1974, by

the ReaLemon National Sales Director to all ReaLemon district and regional sales managers, as follows (CX 81, Part II, p. 9000):

In order for us to better formulate ReaLemon promotions in 1974, it would be helpful if you could at your earliest convenience direct to my attention the type competitive lemon juice activity in your district, that is, Golden Crown, Vita Pakt, Sunkist, etc.

At the same time it would be helpful if you could include their list price to the trade, any deals, etc. In addition, we would also like their retail price and our retail price for the corresponding size.

If you will supply us with this information I am sure that we will be in a better position to assist you in furthering the sale of ReaLemon in your district.

[42] All of the foregoing brands mentioned are other processed lemon juices, including Sunkist. There was no request for competitive activity in the sale of fresh lemons.

59. In letters in November 1973 to headquarters officials of the Borden Foods Division of Borden, Inc., the ReaLemon National Sales Director analyzed the ReaLemon market position in the following major metropolitan areas (CX 81, pp. 7439–40, 7478–79):

Philadelphia	Buffalo
New York	Chicago
Cleveland	Detroit
Pittsburgh	Indianapolis
Boston	Milwaukee
Baltimore/Washington	Minneapolis/St. Paul
St. Louis	

These letters focused upon the competitive problem of Golden Crown bottled lemon juice. No mention whatever was made of competition from fresh lemons.

60. A former Regional Sales Manager for respondent's ReaLemon processed lemon juice for the Northeastern area of the United States received reports from brokers under his supervision concerning the competitive situation they faced, and forwarded competitive reports to his superior, ReaLemon's National Sales Director. These reports likewise concerned competing processed lemon juice products, not fresh lemons (Taft, Tr. 1278–83). This former Regional Sales Director testified, as follows (Tr. 1279, 1282):

Q. So that I understand, do you recall receiving any correspondence from your broker concerning fresh lemon activity?

A. None whatsoever. [43]

* * * * * * *

Q. Mr. Taft, why were competitive reports sent from brokers to you concerned exclusively with other lemon juice products when discussing ReaLemon juice competitive activities?

A. The reconstituted lemon juice part of the business of ReaLemon Foods was the major bellwether of it and the principal concern was competitive bottled lemon juice to the sizes, and lime juice too, to the sizes that ReaLemon made, packed in the bottles.

61. Respondent's ReaLemon brokers concerned themselves only with the competitive activity of other brands of processed lemon juice, not fresh lemons. The president of a Philadelphia based food broker testified (Vinocur, Tr. 2089–2090):

Q. Do you recall sending Mr. Taft [ReaLemon Regional Sales Manager] competitive reports concerning fresh produce such as lemons?

A. No, sir.

Q. Why were the reports concerning ReaLemon lemon juice written exclusively about other lemon juices?

A. I take it you mean reconstituted lemon juice.

Q. Yes, if that is what they were in regard to.

A. Yes. Well, we strictly were concerned only with other brands of reconstituted lemon juice.

Q. Why?

A. Well, questions were only asked about other brands by ReaLemon of reconstituted lemon juice. [44]

Q. Questions by Mr. Taft?

A. Questions by Mr. Taft about ReaLemon. There were no questions asked about other forms of lemon juice in reference to reconstituted, bottled lemon juice.

Q. Is it fair to say your impression was they weren't interested in these other products?

A. It is a different category. Sure it is a lemon juice, but different shoppers, different market in essence.

JUDGE HANSCOM: What is a different market?

THE WITNESS: When I — bottled, reconstituted lemon juice is one type of market where there are certain people who use reconstituted, bottled lemon juice, and then there are others who would want to use fresh lemon juice, whether for the peel or whatever purposes they want. They don't want to use a reconstituted lemon juice. We never felt that one was in competition with the other as far as marketing plans.

* * * * * * *

Q. When you refer to fresh lemon juice, you are referring to the juice of fresh lemons?

A. Yes, sir.

To the same effect: Silver, a Pittsburgh broker, Tr. 3434; Gordon, a Minneapolis broker, Tr. 3392–93; Conrady, a Grand Rapids broker, Tr. 3488–89. [45]

62. The president of respondent Borden's ReaLemon Foods viewed the competitive marketplace in which he was responsible for marketing ReaLemon processed lemon juice to consist of other processed lemon juice brands. He testified (Peters, Tr. 1783):

. . . in my mind there is a very clear distinction between the competitive marketplace and the relevant marketplace which is under discussion here. In the competitive marketplace I am, a very immediate day-to-day basis, our concern is obviously with bottled reconstituted lemon juice, and we formulate policy in the office and write up annual marketing plans and the like.

F. Other Marketers of Processed Lemon Juice Viewed Their Competition To Be ReaLemon and Other Brands of Processed Lemon Juice

63. The president of "Tropic Fresh," a Florida based regional brand of processed lemon juice already mentioned, testified (Tr. 541):

Q. Mr. Kendall, who are your competitors in the sale of lemon juice?
A. Our competitors in the sale of lemon juice are ReaLemon and Golden Crown.

His Sales Manager testified to the same effect (Westcott, Tr. 597):

Basically we sell against other lemon juices. We actually compete against other juices and drink products constantly.

[46] The President and Chief Executive officer of "Seneca," a regional processed lemon juice brand, also mentioned earlier, based in the Northeast, testified that the competitors he was familiar with were ReaLemon and Golden Crown, in addition to his own brand (Wolcott, Tr. 647). The Division Manager, Product Sales Division, Sunkist Foods, testified (Tr. 682):

Q. Mr. Delaney, who are Sunkist reconstituted lemon juice's competitors?
A. In the markets in which we are distributing, ReaLemon and Vita-Pack. I am not sure in the Texas market.

As to whether Sunkist's brand of processed lemon juice competed with fresh lemons, this executive thought that those products were probably in two different markets (Tr. 684):

Q. Mr. Delaney, does Sunkist reconstituted lemon juice compete with fresh lemons at the retail level?

A. In my opinion, that's a difficult question to answer. From the standpoint that Sunkist does market fresh lemon [sic], they also market reconstituted bottled lemon juice. In my opinion, we're probably looking at two different markets eventually. If a product has the same usage, there will be some competition, yes.

Where process lemon juice producers saw competition between their products and fresh lemons, it is clear that this was in the broadest sense (see, *e.g.*, Kendall, Tr. 569; Westcott, Tr. 614–15; Wolcott, Tr. 662–63). [47]

G. Fresh Lemons Are Marketed Without Regard for the Availability of Processed Lemon Juice

64. The Lemon Administrative Committee, operating pursuant to the authority of the Agricultural Marketing Act of 1937 under the supervision of the U.S. Department of Agriculture, regulates the volume of shipments of fresh lemons from California and Arizona domestically, and to Canada and Alaska (Faulkner, Tr. 1687–1701). The Manager of the Lemon Administrative Committee testified that in determining shipments of fresh lemons to the market the Committee does not consider "the availability of reconstituted or other processed lemon juices," the availability of fresh lemons in the market being the key factor considered in releasing additional supplies (Faulkner, Tr. 1723).

H. Fresh Lemons And Processed Lemon Juice Brands Have Specialized Vendors, Wholly Different Production Facilities, and Are Bought for Resale by Different Supermarket Buyers and Sold to the Public by Different Supermarket Departments

65. This proceeding contains the testimony of officials of two producers of fresh lemons, Sunkist Foods and Ventura Coastal Corporation. The former is well known. Ventura Coastal is a subsidiary of the Seven-Up Company. The Division Manager of the Product Sales Division of Sunkist Foods testified that Sunkist was divided into a "fresh fruit marketing group and a products marketing group" (Delaney, Tr. 678). As noted, Sunkist produces and markets a processed lemon juice in competition with ReaLemon processed lemon juice, and also sells lemon concentrate to ReaLemon, Sunkist's largest customer for that substance (Tr. 679–682). Fresh lemons and Sunkist's processed lemon juice are sold through two completely distinct company organizations (Delaney, Tr. 687–88): [48]

Q Now, Mr. Delaney, can you tell us what kind of sales organization you have for your reconstituted lemon juice?

A Our reconstituted bottled lemon juice is sold through a broker network, and we have approximately 35 to 40 brokers across the United States. But as you can appreciate being in only the three markets we're in, Northern and Southern California and Texas, there is a limited broker involvement.

Q Mr. Delaney, are you familiar with the sales organization used to sell Sunkist fresh lemons?

A Well, we have approximately 40 district offices of Sunkist across the United States.

Q Would it be fair to characterize these [two] sales organizations as different — not the same as sales organizations?

A No. Our fresh sales organization is completely different from the products organization.

Similarly, the Ventura Coastal Corporation marketed its fresh lemons and frozen lemon juice through two completely different sales divisions (Higby, Tr. 738–39).

66. Fresh lemons are marketed through produce brokers, who sell fresh lemons through produce wholesalers (Higby, Tr. 744; Faulkner, Tr. 1700; Beavers, Tr. 1581; Watson, Tr. 6203; Lemmerman, Tr. 969–70; Imming, Tr. 4602). The produce brokerage business is one characterized by fluctuating prices and requires a special expertise (Beavers, Tr. 1582). [49] Processed lemon juices are sold through food brokers or company salesmen (Higby, Tr. 745; Kendall, Tr. 540; Hansfield, Tr. 130, 149).

67. Bottled lemon juice, such as ReaLemon, is sold to supermarket grocery buyers whereas fresh lemons are sold to supermarket produce buyers (Hansfield, Tr. 152–53; Delaney, Tr. 689; Ellenson, Tr. 1963; Friedland, Tr. 1494; H. Greenberg, Tr. 1190; Lemmerman, Tr. 974; Manos, Tr. 1521; Moreland, Tr. 1024; Vinocur, Tr. 2107; Wolcott, Tr. 648; Wrisley, Tr. 2188; Foorman, Tr. 5048; Thomas, Tr. 3263). Grocery buyers and brokers recognize distinct problems faced by produce buyers, such as spoilage, bulk transfer costs, supply fluctuations, and fluctuating prices (Thomas, Tr. 3262; Foorman, Tr. 5048; Wardell, Tr. 3315). Grocery buyers, generally, do not consider themselves competent to be produce buyers due to the expertise needed (Lemmerman, Tr. 981; Moreland, Tr. 1024; Toms, Tr. 3106; Thomas, Tr. 3262; Sherry, Tr. 3415–16; Rose, Tr. 4631). As a result of the purchase by different departments, fresh lemons are displayed and sold to the public in the fresh fruits and vegetable departments of supermarkets and retail food stores, whereas bottled lemon juice,

except in some instances of plastic squeeze containers shaped like fresh lemons, is carried on the shelves of the grocery department.

68. Production facilities for fresh lemons and processed lemon juice are, of course, wholly distinct. Fresh lemons are grown in warm climates such as California, Florida and Arizona, and are picked, processed by being washed, sorted, waxed, sized, etc., and are then marketed as fresh produce (Higby, Tr. 743–44; Delaney, Tr. 688). Processed lemon juice such as ReaLemon can be manufactured anywhere using lemon concentrate, water, a preservative, and mixing and bottling machinery (Wolcott, Tr. 635–36; Delaney, Tr. 679–80; Peters, Tr. 1785; Hansfield, Tr. 132–34; CX 2, p. 673). [50]

69. Based upon all of the foregoing, as indicated at the beginning of this section, the undersigned finds that processed lemon juice constitutes a valid relevant product market within which to consider respondent Borden's competitive conduct in the marketing and sale of its ReaLemon reconstituted lemon juice. Although in a broad sense fresh lemons and bottled reconstituted lemon juice may compete for many of the same end uses in the hands of the public, the two products are so drastically and substantially different from each other in a variety of crucial and important characteristics of economic and other significance that they constitute at the very least components of separate and distinct submarkets for antitrust and restraint of trade purposes, that is, for testing the allegations of the complaint in this proceeding.

Monopoly Power

A. Respondent Borden Possessed a Monopoly Share of the Processed Lemon Juice Market

70. Having determined that processed lemon juice constitutes, at the least, a valid submarket for the purposes of this proceeding, there is no question that respondent Borden's ReaLemon brand over the years has had, and now has, a monopoly share of that market. Market share data from several different sources are in the record and all are essentially consistent.

71. Respondent's ReaLemon Marketing Plans, already discussed in some detail, gave repeated consideration to its market share of processed lemon juice, both nationally and in important metropolitan areas, and to that of its processed lemon juice competitors. As described, the 1971 Marketing Plan referred to the 92 percent market share of ReaLemon (CX 1, p. 639): [51]

C. MARKET SHARE AND COMPETITIVE SITUATION

1. Bottled Lemon Juice is in virtual 100% distribution throughout the United States, with an estimated market share of 92% at the beginning of 1970, and 88.2% through August. (Source S.A.M.I.)

The "S.A.M.I." source referred to is "Selling Areas - Marketing, Inc.," which is a recognized and well established market research organization. Respondent's ReaLemon management subscribed to "S.A.M.I." reports beginning in 1971, and has relied on them in determining market shares for the purpose of charting business courses (CX 1-4; CX 81, pp. 7289, 7307-7308, 7314, 7316, 7482; CX 263; CX 323). "S.A.M.I." reports are in common use by businessmen in the grocery industry, are considered highly reliable, and were provided by respondent's ReaLemon management to its sales personnel for use in marketing ReaLemon processed lemon juice (Taft, Tr. 1317-1320; Manos, Tr. 1524; Lemmerman, Tr. 978-980; Laurent, Tr. 2212-2214; H. Greenberg, Tr. 1202; Friedland, Tr. 1500; Ellenson, Tr. 1965-66; Leahy, Tr. 842-43; Gerace, Tr. 2033; Delaney, Tr. 686; Kendall, Tr. 551; Hansfield, Tr. 153-56; Wolcott, Tr. 653; Renner, Tr. 2603-2604; Springer, Tr. 1862-63; Vinocur, Tr. 2141-42; Wrisley, Tr. 2175; Silver, Tr. 3435; Higby, Tr. 749; Bentley, Tr. 3290).

72. The 1971 Marketing Plan of ReaLemon further stated its "Long Range Objective," a portion of which has also already been quoted, showing its dominant position in the processed lemon juice industry (CX 1, p. 649): [52]

III. OBJECTIVES OF THE PLAN

A. LONG RANGE OBJECTIVE

1. Historically, ReaLemon has been THE total market for both bottled lemon and lime juices. Media and promotional expenditures directed toward attracting new users and increasing uses with present buyers have been highly successful and were directly related to ReaLemon's sales history. This same media and promotional effort presently blankets sales of all bottled lemon juice, including those of competition. In other words, ReaLemon has now become a protective umbrella over all lemon juice activity. The long range objective therefore, is to expand the size of this umbrella and thus the total market.

73. The 1972 Marketing Plan of ReaLemon, prepared and submitted by its president, quoted in part earlier, stated (CX 2, p. 661):

EXECUTIVE SUMMARY

* * * * * * *

A cautious optimism is also necessary in considering the competitive picture. In a completely unique situation, ReaLemon Lemon Juice presently commands a premium of as high as 25 to 30 cents per unit over competitive offerings. [53] No such differential on any other food product, frozen or non-frozen, exists anywhere in the industry. *Such differentials have definitely hurt our efforts in individual markets, although our overall market share is still in the 90% range.* In order to maintain this kind of market share, it will be necessary to expand our marketing effort in order to generate growth in total lemon juice sales. Given the dollars, our marketing know-how should enable us to meet this goal. (Emphasis added.)

Subsequently in the 1972 Plan ReaLemon's president stated (CX 2, pp. 669, 675, 677):

THE MARKET

* * * * * * *

(a) Market Description REALEMON'S sales of bottled and plastic lemon juice for 1970 amounted to approximately 18 1/2 million dollars. With a 90% share of market, the total, therefore, would be somewhat in excess of $20 million. REALEMON'S case volume in 1970 was slightly in excess of four million cases, packed in a combination of 12 and 24 pack units, or a grand total of approximately 77,000,000 units.

* * * * * * *

. . . As the SAMI Report indicates in Appendix #3 REALEMON on an overall basis, [54] still have [sic] an approximate 90% share of market, with the other competitors sharing the balance. No one of them stronger, perhaps, than a 3-4% share of the market.

* * * * * * *

Problems and Opportunities:

The problem in terms of severe retail differentials has already been described.

The opportunity for maintaining our position must be one of making the total market grow. *Thus far, we have been virtually the only brand advertised, and for the most part, the only brand promoted.* The level of both our advertising and promotion must be maintained and increased, so that we can make the total category larger. *With our market share of approximately 90%, growth in the total market automatically represents growth for REALEMON.* (Emphasis added.)

74. The 1973 ReaLemon Marketing Plan again reported market shares for ReaLemon and its major competitors (CX 3, p. 759):

Market Share and Trend

The following reviews SAMI dollar share data for the lemon and lime category. [55]

	Year Ending 12/25/70	*Year Ending 12/24/71*	*7 Months Ending 8/4/72*
REALEMON	91.8	91.4	88.0
GOLDEN CROWN	1.4	2.4	5.5
SENECA	2.0	1.5	1.1
SUNKIST	2.1	1.7	1.4
VITA PAKT	.4	.5	.4
TREESWEET	.5	.4	.4
ALL OTHERS	1.8	2.1	3.2
TOTAL	100.0	100.0	100.0

As previously noted while the overall market share of ReaLemon has had a relatively small decline, recent trends are more severe. In addition, only a market-by-market review can indicate the situation due to the limited distribution of Golden Crown, the major competitive brand.

75. Complaint counsel in this proceeding obtained data from firms marketing processed lemon juice (CX 239; Dr. Greenberg, Tr. 2794–2806, 2807–2837, 2844–49, 2850–53). This data shows the following market shares:

Market Shares of Leading Four Firms
Processed Lemon Juice Industry
1969–1974

Market Shares Measured in Gallons
(Percent of Market)

Firm	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*
A	88.7	86.1	84.2	80.2	77.4	75.3
B			4.4	9.1	13.1	14.9
C	1.4					1.4
D	1.9	3.1	2.2	1.8		
F	2.8	2.5	2.1	1.8	1.6	
G		1.7			1.4	1.4

[56] Market Shares Measured in Dollars
(Percent of Market)

Firm	*1969*	*1970*	*1971*	*1972*	*1973*	*1974*
A	88.9	87.1	86.1	82.9	79.9	77.8
B			2.7	5.9	9.2	10.6
C	1.2					1.9
D		1.5				
E				2.2	3.2	2.9
F	3.0	2.7	2.2	1.7	1.5	
G	1.2	1.5	1.7			

Source: Compiled from data submitted by firms (CX 239).
The firm "A" is ReaLemon and firm "B" is Golden Crown (Dr. Greenberg, Tr. 2806).

76. Using "S.A.M.I." reports, complaint counsel tabulated the ReaLemon market share of bottled lemon and lime juice category in 30 major metropolitan markets from January 22, 1971, through April 1974 and, in some instances, May 1974 (CX 258). For April or May 1974, this data shows the following market shares of ReaLemon in the cities listed:

	Equivalent[2] Units
Atlanta	78
Baltimore/Washington	76
Birmingham/Montgomery	80
Boston/Providence	70
Buffalo	65
Charlotte	80
Chicago	76
Cinn/Day/Columbus	91
[57] Cleveland	79
Dallas/Ft. Worth	80
Denver	67
Detroit	72
Houston	97
Indianapolis	89
Jacksonville/Tampa	70
Kansas City	97
Los Angeles/S.D.	54
Memphis/L.R.	96
Miami	86
Milwaukee	72
Minneapolis/St. Paul	99
New Orleans	87
New York	81
Philadelphia	73
Phoenix/Tucson	81
Pittsburgh	86
St. Louis	89
San Francisco	92
Seattle/Takoma	97
Syracuse	77

77. The 1974 ReaLemon Marketing Plan provided shares for 30 of

[2] SAMI reports adjusted cases of different size containers to equivalent gallon units (see CX 258 A and Tr. 2316-17).

the nation's leading metropolitan areas for the 52 weeks ending August 31, 1973 (CX 4, p. 883):

SAMI UNIT SHARE - 52 WEEKS ENDING 8/31

REALEMON

MARKET	*TOTAL BOTTLED*
Atlanta	77.1
Balt/Wash.	80.1
Birm/Mont.	77.7
Boston/Prov.	69.2
Buffalo	68.5
Charlotte	28.7
[58] Chicago	73.4
Cincinnati	87.5
Cleveland	81.6
Dallas/Ft. Worth	71.9
Denver	55.4
Detroit	70.2
Houston	86.7
Indianapolis	87.5
Jacksonville/Tampa	69.1
Kansas City	83.9
L.A./San Diego	40.1
Memphis/Little Rock	90.3
Miami	70.1
Milwaukee	70.8
Minn/St. Paul	89.5
New Orleans	82.7
New York	78.0
Philadelphia	73.9
Phoenix/Tucson	71.2
Pittsburgh	81.6
San Francisco	77.1
Seattle/Tacoma	83.7
St. Louis	86.1
Syracuse	66.4

Although there are some differences between the foregoing figures and those contained in complaint counsel's tabulation and listed in the previous finding, overall the shares stated in both sources are quite consistent.

78. According to respondent's own Marketing Plan derived from "S.A.M.I." reports in August 1973, in 12 metropolitan areas, Baltimore/Washington, Cincinnati, Cleveland, Houston, Indianapolis, Kansas City, Memphis/Little Rock, Minneapolis/St. Paul, New Orleans, Pittsburgh, Seattle/Takoma and St. Louis, containing around 23,000,000 people, respondent ReaLemon's share of the processed lemon juice market was 80 percent or greater. In another

4, Atlanta, Birmingham, New York City and San Francisco, containing another 15,000,000 or more people, respondent's possessed a 75 percent market share, and in 7 more, Chicago, Dallas, Detroit, Miami, Milwaukee, Philadelphia and Phoenix, where another 22,000,000 people live, respondent's ReaLemon held over 70 percent of the market.

B. Industry Concentration Ratios

79. In view of the dominant market share of processed lemon juice commanded by respondent Borden's ReaLemon brand, it would be expected that industry [59] concentration ratios would be high. And they are. The four-firm concentration ratios in the processed lemon juice industry for the years 1969 through 1974 were (CX 239):

Year	
1969	94.3
1970	92.8
1971	92.7
1972	92.7
1973	93.8
1974	93.2

These are exceptionally high ratios (CX 295–299).

C. ReaLemon Is the Dominant Brand and Virtually the Generic Name for Bottled Lemon Juice and Commands a Premium Price

80. Respondent Borden acquired the ReaLemon-Puritan Company in 1962, and thus acquired the ReaLemon brand name and processed lemon juice business. Respondent paid $12,370,514 for the ReaLemon-Puritan Company although the adjusted net worth of ReaLemon-Puritan assets acquired was $2,767,619 (RX 363, p. 52; Dillon, Tr. 4849–4850). The difference in the two figures represents "good will" of which it may be concluded that the "ReaLemon" brand, and the sales and profits achieved by that brand name, were the key factors. The ReaLemon bottled lemon juice business was an outgrowth of a fresh lemon juice operation commenced in 1935 (Schwartzberg, Tr. 2971–75; RX 198, 216). The ReaLemon name was adopted in 1944 or 1945 and ReaLemon was the first bottled lemon juice on the U.S. market (Schwartzberg, Tr. 2975).

81. The complete dominance and acceptance by the public of the ReaLemon brand name are clear from the record. ReaLemon

processed lemon juice is the only [60] nationally distributed brand, all other brands being local or regional, with the possible recent exception of Golden Crown (CX 1, pp. 640–42; CX 3, pp. 767–68). As already described, the 1971 Marketing Plan described ReaLemon as "the total market" for bottled lemon juice stating that it had become the "protective umbrella" over all lemon juice activity (CX 1, p. 649). As also described, the president of ReaLemon Foods in the 1972 Marketing Plan characterized the ReaLemon brand as "one of the greatest brand names in the history of the supermarket" (CX 2, p. 670), and further noted that in a "completely unique situation" ReaLemon lemon juice commanded a premium of 25 to 30 cents per unit over competitive bottled lemon juices, and that no such differential on any other food product, frozen or non-frozen, existed anywhere in the industry (CX 2, p. 665).

82. The 1973 Marketing Plan reported that "on a national basis" ReaLemon lemon juice, 32 oz. size, enjoyed a 36.3 percent price premium over the leading competitive brand (CX 3, p. 740). No price increase was planned for 1973 due to the "large and important price differential between ReaLemon and competitive brands" (CX 3, p. 807). The 1974 Marketing Plan reported that in April/May and June/July of 1973, the consumer cost for a 32 oz. bottle of ReaLemon lemon juice was 62¢ whereas the cost for the leading competitive brand was 46¢ to 48¢, ReaLemon thus commanding a price premium of about 30 percent (CX 4, p. 855).

83. The price differentials obtained by ReaLemon lemon juice were not due to any inherent product superiority, but rather to the premium brand image of ReaLemon created by a number of factors including advertising and promotion over the years. The president of respondent Borden's ReaLemon Foods, as noted earlier, stated in the 1972 Marketing Plant (CX 2, p. 673): [61]

> From a technical standpoint, REALEMON has no apparent advantage over the juice of any of its competitors. Processed lemon juice is processed lemon juice, and is not as good as the fresh equivalent in its taste qualities.

The 1971 Marketing Plant described one of two short-range objectives (CX 1, p. 650):

> Although reconstituted lemon juice is virtually indistinguishable one brand from another, heavy emphasis on the ReaLemon Brand name through its media effort should create such memorability for the brand, that an almost imaginary superiority would exist in the mind of the consumer, a justification for paying the higher price we are asking.

The 1973 Marketing Plan stated, quoting from a management summary (CX 3, p. 756):

"ReaLemon is thought of as *the* commercial lemon juice. It is widely known and has an image of quality in its field (for fresh and commercial users alike)." (Emphasis in original.)

84. The Center For Advanced Marketing Practice reported to ReaLemon Foods in May 1972, after a study of consumer attitudes described earlier (CX 286, p. 7681):

BRANDS AND PATTERNS OF USAGE

Brands

"ReaLemon is really the only one" expresses the prevailing sentiment in these groups. While respondents [62] are aware of a few other brands (Seneca, Shop-Rite, Crown, National), ReaLemon is the one that stands out as *the* commercial lemon juice. These women feel it was the original commercial lemon juice and has been available for many years. Although no differences were mentioned between ReaLemon and the other products, both commercial and fresh users see ReaLemon as the brand that is proven and reliable and has captured their brand loyalty. (Emphasis in original.)

The report further noted that the impact of the ReaLemon name "is also evidenced by the frequency with which respondent refers to 'real' lemon juice when discussing the fresh product" (CX 286, p. 7681).

85. Witnesses from the industry testified that the ReaLemon brand was completely dominant, commanded premium prices, and was virtually the generic term for processed lemon juice. A former ReaLemon Regional Sales Manager stated (Taft, Tr. 1284):

Q Why was ReaLemon able to command a higher price than these competitors?

A ReaLemon was first in the business and over a long period of years they had established a very dominant consumer and trade-wise acceptance.

Q How would you evaluate ReaLemon's brand name as far as its impact on potential buyers?

A It is almost generic.

[63] The former head grocery buyer for a division of a large Eastern supermarket chain testified (Moreland, Tr. 1022):

Q Will you tell us why Acme has continued to stock ReaLemon during at least this 12 year period that you are familiar with?

A There is a customer demand for the item. ReaLemon is almost a generic term for lemon juice, like Coke or Morton's Salt.

A Pittsburgh food broker testified (Silver, Tr. 3436):

Q Comparative strength — do you have an opinion as to the comparative strength of ReaLemon in the sense of its strength with the consumer and recognizability?

A Well, I would say if you were thinking of peanuts you would think of Planters. If you think of refrigerator you think of a Frigidare. It is synonymous with the name.

Q If you think of lemon juice?

A I would think of ReaLemon.

The president of a Philadelphia brokerage firm testified (Vinocur, Tr. 2106):

Q. Mr. Vinocur, are you familiar with the term "premium brand"?
A. By that I take it you mean —
Q. I would like to know what you mean. [64]
A. By "premium brand" would be the brand that has the quality connotation or the advertising behind it or brand acceptance by the — Mrs. Consumer.
Q. Is ReaLemon a premium brand?
A. ReaLemon is a very sound, strong, premium brand.
If I may add, there is similarly — as ReaLemon is to the lemon juice market, Jello is to the gelatin market. I feel that the people have accepted ReaLemon as the standard of product of lemon juice.

The Grocery Buyer for the leading supermarket in the Buffalo area testified (Gerace, Tr. 1988):

. . . ReaLemon is — well, as I mentioned earlier, it is like Crisco. It is the name of the ReaLemon. When you say lemon juice in reconstituted form it is generally ReaLemon. It is the product that the customers have used for years, and they are very familiar with it. . . . So ReaLemon has over the years, over the years, has just developed their name. When people want a reconstituted lemon juice the demand has been for ReaLemon.

Another marketer of processed lemon juice testified (Wolcott, Tr. 647):

Q. Why, in your opinion, Mr. Wolcott, does ReaLemon command a premium price?
A. Because they have a consumer franchise that's similar to Welch's Grape Juice and Miracle Whip Salad [65] Dressing and many other brands that have been selected, and because of that consumer franchise the consumer perceives the product to be superior and will pay a premium price for it, or if the products are priced competitively or at the same price, they will tend to buy the brand.

The Grocery Buyer for a Wisconsin based wholesale-retail grocery chain testified (Ellenson, Tr. 1960–61):

Q. Mr. Ellenson, can you tell us why you think that ReaLemon commands a higher price both at your cost level and at the retail level?
A. Personally I think that the ReaLemon people, being in the Wisconsin market, for the length of time that they have built a brand image that they have, that when a consumer walks into a retail store to pick up a bottle of [reconstituted] lemon juice, she's got in her mind that it is ReaLemon, regardless of whose it is; and we found this true in many other categories that we carry.
The first in, that constantly promotes their own name themselves, seems to almost create a brand identity in the consumer's mind that she just can't get out of it.

See for similar testimony: Hogue, Tr. 420–22; Pripstein, Tr. 4681; Boden, Tr. 2662; Thomas, Tr. 3266–67; Westcott, Tr. 606–607;

Laurent, Tr. 2240; Kendall, Tr. 542; Immekus, Tr. 1627–28; Friedland, Tr. 1491–92; and Crane, Tr. 3462. [66]

86. Shelf space in retail food stores, particularly supermarkets, is often limited with many products competing for what is available (Hogue, Tr. 414). Processed lemon juice industry members testified that if a supermarket had only room for one brand of processed lemon juice on its shelves, that brand would be ReaLemon (Wrisley, Tr. 2178–79; Gordon, Tr. 3406; Pripstein, Tr. 4683; Sherry, Tr. 3412–13; Kendall, Tr. 549–50; Wolcott, Tr. 651; Leahy, Tr. 846–47; Renner, Tr. 2603; Immekus, Tr. 1629–30; Lemmerman, Tr. 971; Rose, Tr. 4620; Foorman, Tr. 5042–44; Thomas, Tr. 3265; Moreland, Tr. 1124; Vinocur, 2102–2103; Westcott, Tr. 610; Beavers, Tr. 1596–97; Goldberg, Tr. 2625–26; H. Greenberg, Tr. 1184). The National Sales Manager of a competing processed lemon juice firm testified (Hogue, Tr. 414):

> . . . We put ourselves in the position of the buyer of that product in the grocery store. He already handles ReaLemon and then we come to him and say, "We have a fine product we want to sell called Vita-Pakt," and he says, "Mr. Hogue, I have plenty of lemon juice. It's a good juice, it sells well, I don't need yours, sir."

87. ReaLemon has advertised its brand name extensively over the years. Until 1972, when Golden Crown "commenced advertising activities on a minor scale in selected markets," ReaLemon was the only significant advertiser in the processed lemon juice industry (CX 3, p. 772). The president of ReaLemon Foods wrote in the 1972 Marketing Plan that ReaLemon in 1970 maintained its position as the "leading bottled lemon juice advertiser," and that ReaLemon's advertising effort including a projected 1971 advertising expenditure of $629,100 contributed to the "continued domination of bottled lemon juice share of market by REALEMON" (CX 2, p. 681). [67]

88. The dominance of the ReaLemon brand and the acceptance of that brand by the public, under the circumstances shown by the record of this proceeding, constitutes a substantial barrier to the entry of new bottled lemon juice marketers.

D. Respondent Borden's ReaLemon Foods Realized a Rate of Return on Assets Far Greater Than That of Other Food and Industry Groups Indicating Monopoly Power

89. Complaint counsel contend that ReaLemon's rate of return on assets for the years 1968 through 1973 averaged nearly four and one-half times the rate of return realized by other firms in the "Food and Kindred Products" industry group, and four and one-half times greater than the rate of return for "All Manufacturing Corpora-

tions" as set out in FTC/SEC Quarterly Financial Reports for the foregoing years (CX 252, 294, 300-301). The ReaLemon rate of return was 25.7 percent on assets in contrast to the 5.82 percent realized by the "Food and Kindred Products Industry" and the 5.97 percent realized by "All Manufacturing Corporations" (CX 294, 300-301). Respondent Borden contends this conclusion is incorrect on the ground that $9,602,895 paid by Borden for ReaLemon over and above that firm's adjusted net worth when acquired in 1962 has not been included in making the calculation. Respondent Borden, as stated earlier, purchased the ReaLemon-Puritan Company in 1962 for $12,370,514 although its adjusted net worth was only $2,767,619 (RX 363, p. 52; Dillon, Tr. 4849). The difference between these figures is the foregoing $9,602,895, which reflected the value of the ReaLemon brand name, the dominant market position thereof and the profitability of the firm. Dr. Michael Mann, an expert economist identified at the beginning of this decision, testified that the $9,602,895 premium paid by Borden for ReaLemon (Tr. 6118): [68]

> . . . reflects the fact that Borden paid a purchase price for the ReaLemon hard assets which discounted a rather handsome stream of future earnings.

And further (Tr. 6121):

> . . . they paid a purchase price substantially in excess of the book value of the hard assets which reflected their judgment that those hard assets were going to bring a stream of income which was substantially in excess of what would have been the case buying just any average food and kindred product firm.

See also Tr. 6161-64 and Tr. 6182. In the opinion of the law judge this is an accurate appraisal. It is plain that had Borden not acquired ReaLemon there would have been no $9,602,895 "goodwill" figure arguably to add to assets in making a calculated rate of return for ReaLemon. Under the circumstances the law judge finds Dr. Greenberg's calculation, CX 294 and Tr. 295-305, to constitute a valid statement of the profitability of ReaLemon Foods after acquisition by respondent Borden, and the contention of complaint counsel, set out at the beginning of this finding, as to the comparative rates of return on assets of ReaLemon and other industry groups to be correct. In a proceeding of this nature the substance of the situation must be the guidepost, not technical matters of accounting practice.

90. Monopoly power, in the opinion of Dr. Mann, is the ability of a firm to hold a price above a competitive level for a persistent period of time (Tr. 6152). The profitability record of ReaLemon over

the years indicated to Dr. Mann "a case study in market power" (Tr. 6131). [69]

E. The Dominance of Respondent Borden's ReaLemon Foods Conferred Substantial Resource Advantages Over Its Processed Lemon Juice Competitors

91. ReaLemon Foods spent more than $5,000,000 on advertising between 1969 and 1974 (CX 288). In contrast, competing processed lemon juice marketers spent little on advertising during this period, as already indicated (Wolcott, Tr. 648; Kendall, Tr. 542; Delaney, Tr. 690; Hansfield, Tr. 159–160). As quoted earlier, the ReaLemon 1973 Marketing Plan documented this fact by stating that ReaLemon was the only significant advertiser in the processed lemon juice industry until some minor-scale efforts of Golden Crown commencing in 1972 (CX 3, p. 772). Additionally, from 1957 through 1972 ReaLemon conducted a strong public relations program throughout the country "to tell the story of the advantage of ReaLemon" (Edelman, Tr. 3218). Promotional materials of all kinds were distributed, including news releases, recipes, pamphlets and even "Educational Kits" for use by high school students, apparently in home economics courses (see, for example, RX 202, 204, 206, 214, 217, 218–19, 220, 222, 223–230 and 378–380). ReaLemon, being the only processed lemon juice marketer with national distribution, was able to use media with nationwide coverage for advertising, including television (CX 1, pp. 639–654; CX 2, pp. 678, 681–683, 689, 693–695, 697; CX 3, pp. 767; CX 4, pp. 869–871, 886, 888; CX 9; CX 14–17; CX 20; CX 32; CX 240–42; CX 244–250; CX 253–56; RX 546; RX 553).

92. As part of the Borden organization, ReaLemon has been able to participate in tie-in advertising and cross-couponing with other Borden foods products, and has done so (CX 1, pp. 647, 653; CX 2, p. 683; CX 3, pp. 777–79, 813–14, 829; CX 4, p. 871, 888; Lundell, Tr. 3357–58; CX 81, p. 7371; CX 127, 240–242, 245, 248, 253, 255–256). In fact, ReaLemon's 1973 [70] Marketing Plan noted that ReaLemon had "significant opportunities to tie-in with other manufacturers," and discussed past use of this merchandising device with a number of other well-known products (CX 3, pp. 776–79). The 1973 Plan concluded tie-ins with other Borden products were advantageous by stating (CX 3, p. 813):

> Special consideration will be given to tie-ins with Borden brands as opposed to other manufacturers in order to effect company economics and to strengthen the overall Borden image among consumers.

93. Faced with a competitive effort by Golden Crown in the early

1970's, ReaLemon Foods developed a million dollar "President's Fund" to "support the ReaLemon Reconstituted Lemon Juice brand" (CX 3, p. 740). This fund had its origins as early as 1971 (CX 3, p. 786), and $1 million allocation from the fund in 1973 was aimed at reversing "Golden Crown share inroads" (CX 3, p. 792). The major strategy to be utilized was the use of "market-by-market case allowances." The 1973 Plan stated (CX 3, p. 792):

> The President's Fund test plays a major role in this program. Even utilizing the Basic Plan $1,604 M trade deal budget with higher expenditures in highly competitive markets and lower expenditures in low competitive markets, this total level is not sufficient to accomplish the objective of reversing the Golden Crown share gains and recovering one-half of the 1972 overall ReaLemon loss.

[71] Respondent Borden spent $2,805,000 in 1973 on promotions of its ReaLemon processed lemon juice, and another $542,000 on advertising (CX 288). The advertising budget was reduced from $1,015,000 to the foregoing figure and the expenditure on promotions was increased from $2,100,000 to $2,805,000 (CX 288). The advantages of such resources, derived from the size and dominant position of ReaLemon in the processed lemon juice industry, are obvious.

94. In fact, the 1973 Marketing Plan scheduled the "utilization of both ReaLemon and Borden internal and external leverages to implement plans" (CX 3, p. 787). These "leverages" included (CX 3, p. 787):

(1) *External Resources (consumer oriented)*

a. Consumer image
b. Consumer advertising
c. Shelf position

(2) *Internal Resources (manufacturing and development oriented)*

a. Plant and equipment capacity
b. Plant and equipment flexibility
c. Financial resources
d. Management ability
e. R & D [Research and Development] capability.

F. Respondent Borden's ReaLemon Foods Possessed the Power To Control Prices and Entry in the Marketing and Sale of Processed Lemon Juice

95. The record of this proceeding establishes, as the foregoing findings describe, that respondent Borden possessed market power in the processed lemon [72] juice industry sufficient to enable it to control processed lemon juice prices, or at least to exercise a

substantial measure of control over such prices, and to control entry by others into the marketing and sale of processed lemon juice. Respondent Borden, in short, possessed monopoly power in the marketing and sale of processed lemon juice. It had the ability to exclude or limit competition, and to control the prices competing processed lemon juice firms could charge for their products. Such firms marketed their brands of processed lemon juice essentially at the sufferance of the ReaLemon brand. That respondent Borden may not have found it expedient or to its best interest from the standpoint of profitability (see CX 2, p. 692) to exercise its control over prices or competition to the fullest extent of its power does not alter the reality shown by this record, that Borden's ReaLemon Foods possessed that power.

96. As the overwhelmingly dominant brand possessing long term public acceptance amounting to a "consumer franchise" which enabled it to charge substantially more for ReaLemon processed lemon juice than its competitors, ReaLemon, and through it respondent Borden, had the power to drive competitors' prices down, or their competing brands off the supermarket shelves, by lowering its own prices. Dr. Michael Mann testified to the market power possessed by a firm with a "successfully differentiated product" such as ReaLemon (Tr. 955–56). Dr. Mann testified that one of the effects in the marketplace of a product with the brand acceptance of ReaLemon is that a new entrant "has to find some means by which to detach customers" from such a brand. In Dr. Mann's expert opinion (Tr. 956):

> If the entrant chooses to do this by opening up a substantial price difference between itself and the existing brands in order to attract the consumers' [73] attention, and does so, then the firm in the dominant position can respond by narrowing the price differential — possibly eliminating it — and this would, one would expect, lead to a decline in the market position of the entrant or its inability to go any further than it may have captured in its initial niche on the market as long as product differentiation remains a strong and important feature of the market.
>
> If the entrant responds to the established firms' narrowing the differential by trying to keep it at the original differential which is considered necessary to detach customers, you can have a ratchet downward effect and the obvious consequence of that could be that the entrant would find its pricing going below its own average variable cost before the established firm would, and since a price below average variable cost is below what economists call a shutdown point, you would minimize losses by shutting down rather than continuing to operate.
>
> It means the entrant will be bankrupted before the established firm would be faced with the same prospect.

97. The undersigned finds from the evidence in this record that, if Borden priced its product so as to eliminate or substantially

narrow the retail price spread between its ReaLemon processed lemon juice and the brands of competitors, assuming retailer margins remained in the same ratio, sales of competing processed lemon juice brands would drastically decline. As a competitor put it, "the consumer perceives the [ReaLemon] product to be [74] superior and will pay a premium price for it," and if the products are "priced competitively or at the same price," the consumer will "buy [that] brand" (Wolcott, Tr. 647). Under the circumstances, as Dr. Mann testified, the only alternative for the competing brand would be to open the price gap by price reduction, initiating a "ratchet downward effect" ultimately driving less well known and less strong brands out of the market or into insignificant positions. Power of ReaLemon over price and competitors is evident.

98. Borden's ReaLemon competitors recognized the ReaLemon market power, and that only the presence of a price differential sufficient to induce the supermarket to stock their brand, and motivating the consumer to buy it, enabled them to survive. The president of Florida based "Tropic Fresh" testified (Tr. 547):

> We have predicated our entire business on the fact that the nationally advertised brands — and then ours would be a regional brand — we would be able to operate, because we don't have the brand recognition, we would be able to operate on the basis of price and offer the housewife a second choice of lemon juice at a lower price. This price will also influence the buyers to take our merchandise on. We have been successful over the last four or five years in convincing buyers and supermarkets they can have two brands of lemon juice on the shelf. We watch prices of our competitors very closely because that is our reason for being on the shelf.

[75] The president of Seneca testified to the same effect (Wolcott, Tr. 650):

> We look at the cost, we look at the price of Realemon, and then we decide how aggressive we're going to be in selling bottled lemon juice. I'm assuming that there is a sufficient — assuming we can sell it sufficiently under ReaLemon to give the buyer a reason to carry a second brand, and assuming that that is enough over our cost to get us a gross profit that's adequate to cover our cost and produce a net profit, then we will compete in the field more aggressively.

Golden Crown likewise maintained a substantial price difference between its reconstituted lemon juice and ReaLemon (CX 4, p. 873).

99. Respondent Borden recognized that it had the power to control prices. In its 1970 Marketing Plan, for example, it was concluded that the price spread between ReaLemon and competing brands should not be permitted to increase, and that, if it were not increased, the ReaLemon market share could be maintained close to its "present level," *i.e.*, 88.2 percent (CX 1, p. 649). Plainly, if the

price spread were decreased, purchasers of other brands would shift to ReaLemon.

100. The high, in fact, extreme, degree of brand dominance attained by ReaLemon over the years indicates, in itself, power over prices and entry. Dr. Michael Mann made a study of product differentiation as a barrier to entry. Dr. Mann defined product differentiation as "a market characteristic in which buyers do not look at the alternative offerings of various sellers as identical" (Tr. 457). In Dr. Mann's expert opinion, as product differentiation [76] becomes a more and more important characteristic of an industry (Tr. 458–59):

> . . . [O]ne would expect that there would be an increase in market dominance. Now the reason for that is that if one conceives of a range of seller offerings, consumers having a lot of choice with respect to alternatives, that product differentiation by its very nature means that certain of these products begin to take on clear distinctions in the consumer's mind as opposed to other offerings. Those sellers who are beneficiaries of the increasing tendency of consumers to focus their attention and attachments to particular offerings of particular sellers and no longer are indifferent among the wide range will find themselves increasingly commanding most of the sales of the products to which consumers have attached themselves. So that I would expect that as product differentiation intensifies, as it becomes a more prominent characteristic of the market, that some sellers are going to command most of the sales of the market, and that you will not have a large number of sellers each with fairly small percentages of the market.

Where product differentiation increasingly characterizes a market, the dominant products are unlikely to be subject to any serious erosion of their market position because the attempt to overcome the advantage of the differentiated product "can be very expensive," and a firm attempting such a project is faced with very large costs (Tr. 459). In Dr. Mann's opinion, where high product differentiation is present (Tr. 471): [77]

> . . . one should expect to find high market concentration; one should expect to find levels of profitability which are persistently, noticeably and markedly above those earned by firms in the general class of economic activities in which they operate, and that this dominance is not easily subject to erosion.

Dr. Mann's analysis is clearly applicable to the processed lemon juice industry. Respondent's ReaLemon is differentiated from other brands to such a degree as to be virtually the generic name for the product itself. Such differentiation, the attendant dominant market share, coupled with the high profitability and premium price commanded by ReaLemon have given, and now give, respondent Borden a substantial measure of power over industry prices and the ability to restrict competition and competitive entry.

Maintenance of Monopoly Power

101. The record of this proceeding demonstrates that Borden formulated and pursued a business policy, the purpose, intention and effect of which was to maintain its monopoly power in the processed lemon juice market. As is described in greater detail later herein, Borden determined to preserve its existing dominant market share against emerging competition, and took action, primarily by means of selective local or regional price reduction strategies, to accomplish that purpose. The record also shows that although Borden suffered some erosion of market position during the years here under consideration, it did succeed in maintaining its monopoly power nationally, and in the great majority of metropolitan areas. [78]

102. At the beginning of 1970 ReaLemon possessed a 92 percent share nationwide of the processed lemon juice market, as earlier stated (CX 1, p. 639). By the mid-1960's, however, several smaller brands of processed lemon juice had established themselves in regional markets. Seneca Foods Corporation began to market its brand of processed lemon juice in competition with ReaLemon in the mid-1960's, primarily in the Northeastern United States (Wolcott, Tr. 634, 646). In the Philadelphia area, Seneca was ReaLemon's largest competitor from 1968 to 1970 (Vinocur, Tr. 2101). By 1971 Seneca was primarily established in the Northeast and North Central regions, but was obtaining some distribution in the South (CX 2, p. 671). Kendall Foods marketed its Tropic Fresh brand of processed lemon juice in competition with ReaLemon beginning in 1966 (Kendall, Tr. 573). Tropic Fresh was sold primarily in the Southeast (CX 2, p. 671). Sunkist brand of processed lemon juice, marketed since 1952, was sold in California, Texas and the Southwest, having contracted from an initially wider marketing area (Delaney, Tr. 681). Vita Pakt was sold mainly in the far West (Hogue, Tr. 404–406). There were others of relative insignificance in comparison with ReaLemon, as described earlier in connection with the relevant market and ReaLemon's monopoly position (CX 1, pp. 640–42; CX 2, p. 671; CX 3, pp. 738, 750, 759, 768; CX 4, p. 853). Additionally, there was Golden Crown, discussed in subsequent findings.

103. Golden Crown Citrus Corporation began as a Chicago based enterprise engaged primarily in home delivery of fruit juices in the Chicago area. In the late 1960's Golden Crown commenced production and marketing of its Golden Crown brand of processed lemon juice. In 1969, Paul Hansfield, later President of Golden Crown, became involved in the management and ownership of the corpora-

tion, and determined to emphasize the manufacture and sale of processed lemon [79] juice for distribution to retail outlets (Hansfield, Tr. 127–28). In that year the company began expanding sales of Golden Crown lemon juice into the Midwestern areas around Chicago. As the company grew, it moved into Eastern areas of the United States in 1970, the Northeast in 1971, the Southeast in 1972, and Southwest and Western areas in 1973 (Hansfield, Tr. 146–48). In 1973 Golden Crown also opened a second producing and bottling facility at Bridgeton, New Jersey (RX 7).

104. The most serious impact of Golden Crown's commencement of distribution to retail grocery stores of its brand of processed lemon juice initially was felt by the other regional brands in the market, particularly Seneca and Tropic Fresh. As already stated, shelf space available for bottled processed lemon juice is limited. Processed lemon juice industry members testified that there is room for only one or two brands on the shelves of most stores, and if there is room for only one brand that brand would be ReaLemon (Wrisley, Tr. 2178–79; Gordon, Tr. 3405–3406; Pripstein, Tr. 4683–84; Sherry, Tr. 3412–13; Kendall, Tr; 549–50; Wolcott, Tr. 651–52; Renner, Tr. 2603; Immekus, Tr. 1629–30; Lemmerman, Tr. 971; Rose, Tr. 4620; Vinocur, 2102–2103; H. Greenberg, Tr. 1184).

105. Most retail food stores will sell only one brand other than ReaLemon, and will purchase the cheapest of the "second" brands available (Wolcott, Tr. 664; Vinocur, Tr. 2102). As a result, when Golden Crown in 1971 entered the Northeastern area where Seneca was selling its product, with a price lower than Seneca could meet, it took sales from Seneca. Between 1971 and 1974, Seneca lost approximately three-fourths of its processed lemon juice sales (Wolcott, Tr. 654). In 1972, Pantry Pride stores in the Philadelphia area sold both Seneca and ReaLemon processed lemon juices. Golden Crown later replaced Seneca in Pantry Pride stores (Friedland, Tr. 1490–91). Frankford-Quaker Stores in Philadelphia also replaced Seneca with Golden Crown while retaining ReaLemon, because Golden Crown [80] offered a price lower than that of Seneca (Leahy, Tr. 846–47). In 1972, Golden Crown entered Tropic Fresh's markets in competition with ReaLemon and Tropic Fresh. Subsequently, Tropic Fresh was forced to withdraw from a number of those markets (Kendall, Tr. 574).

106. As its Marketing Plans make clear, by 1971 ReaLemon had begun to consider Golden Crown a serious threat to its dominant market position (CX 1–4).

A. ReaLemon Had the Purpose and Intent of Hindering and

Restraining Competing Brands of Processed Lemon Juice and of Maintaining Its Monopoly Power

107. ReaLemon's Marketing Plans for the years 1971 through 1974, and other internal corporate documents, clearly reveal the determination and intent of ReaLemon's management to maintain, in the face of competition from Golden Crown and other processed lemon juice producers, the predominant market share and monopoly position historically held by ReaLemon processed lemon juice. The Marketing Plans portray respondent's concern over the growing inroads of Golden Crown as a competitor to ReaLemon in certain markets, and the development of programs and strategies to combat the threat to ReaLemon's market share posed by Golden Crown (CX 1-4). In discussing these Marketing Plans there will be some unavoidable repetition of material contained in earlier sections of this decision because much in the Marketing Plans is highly material to the product market, and to respondent Borden's position in that market, as well as to the present section.

108. In its 1971 Marketing Plan, ReaLemon's management cited SAMI data estimating that ReaLemon lemon juice was in virtually 100 percent distribution nationwide, and that while ReaLemon enjoyed a 92 percent market share at the beginning of 1970, its nationwide market share had fallen to 88.2 percent by August of [81] that year (CX 1, p. 639). The Plan reported that beginning in 1970 competition from lower priced brands had begun to make serious inroads into ReaLemon's market share (CX 1, p. 645). Of the 10 to 12 competitiors in the bottled lemon juice business, the report identified three—Golden Crown, Seneca, and Tropic Fresh—as those causing the most difficulty (CX 1, p. 640). The report also identified a number of "key" areas in which competition posed the greatest danger to ReaLemon, as follows (CX 1, p. 640):

For the four (4) week period ending 9/4/70, as compared to the same 4 weeks a year ago, brand share in equivalent units, dropped in the following:

Milwaukee	— from 94.2% to 89.4%
St. Louis	— from 100.0% to 96.4%
Buffalo	— from 100.0% to 81.3%
Chicago	— from 91.7% to 85.7%
Cincinnati, Dayton and Columbus	— from 98.8% to 94.2%,

all of which now have Golden Crown Brand Lemon Juice for competition.

Philadelphia, under the siege of Seneca competition, has dropped from 94.5% to 85.1%. Markets presently under attack by both Seneca and Golden Crown show:

Pittsburgh	— down from 99.2% to 62.5%

Indianapolis — down from 98.2% to 88.4%.

109. The 1971 Marketing Plan set out ReaLemon's determination to maintain its approximate 90 percent market share described in the foregoing finding (CX 1, p. 650). ReaLemon recognized the problem [82] presented by the spread between the price of ReaLemon bottled lemon juice and the brands of its competitors, and decided to deal with this problem by "obscuring" the price differential for the customer. The Plan stated (CX 1, p. 650):

> Although reconstituted lemon juice is virtually indistinguishable one brand from another, heavy emphasis on the ReaLemon Brand name through its media effort should create such memorability for the brand, that an almost imaginary superiority would exist in the mind of the consumer, a justification for paying the higher price we are asking.
>
> * * * * * * *
>
> . . . [T]he reflection of this spread at retail level must be obscured for the consumer. To accomplish this, more advertising and promotional monies will have to be spent in 1971.

Steps were planned, nevertheless, to combat competing brands in specific markets where they had been making inroads by reducing the price spread between ReaLemon and such brands. Couponing as a method of attacking the spread was considered (CX 1, p. 653) but, more important, the ReaLemon practice of conducting trade promotions on a uniform, nationwide basis was abandoned permitting an attack on competing brands in specific markets, as follows (CX 1, p. 656):

> . . . In those markets where competition has been making inroads, tentative plans are to increase the size of the [promotional] allowances to as much as $1.20 per case, or 10¢ per bottle. Based on past history, [83] it is hoped that the trade will reflect reduced retails of as much as 15¢ per unit. We will again be specifically attacking the problem of the retail price spread between ReaLemon and competition. In general terms, competitive activity exists in the Eastern half of the United States and for the Western Half, promotional allowances will be limited to a range of 60 to 75 cents per case.

110. Between 1967, which year ReaLemon noted marked "the advent of competition," and 1970 the ratio of expenditures for advertising and promotions shifted substantially toward the latter "because of competition" (CX 1, p. 646). Promotions, that is, allowances to retailers off invoice on a per-case basis, were particularly adapted to attacking competing brands in specific markets (CX 1, p. 656).

111. By the time the 1972 Marketing Plan was developed,

ReaLemon's estimated share of the bottled lemon juice category, based on "SAMI" data, was still about 90% (CX 2, p. 668). Of the 10 to 12 small competitors in the market, none with a market share of more than 3-4%, particular attention was given to Golden Crown. The Plan stated that Golden Crown had had good success in the Northeast and North Central regions, and had begun to expand into the South (CX 2, p. 675). However, Golden Crown, Seneca and Tropic Fresh were all listed as serious competitors, each of them reported as substantially undercutting ReaLemon's price (CX 2, p. 671). The 1972 Marketing Plan set forth ReaLemon's "basic platform for 1972" which included as a "specific objective" combatting "low priced competition" (CX 2, p. 690). ReaLemon recognized this low priced competition as its most serious threat, and determined to use both trade promotions and advertising to combat it (CX 2, p. 671). [84]

112. The use of trade promotions to restrict competition is clear. In the face of "low priced competition" from other processed lemon juices, trade promotions became "a tool or lever against competition" (CX 2, p. 688), an "important tool in dulling the efforts of competition" (CX 2, p. 700). ReaLemon considered it of "paramount importance that ReaLemon continue to be the featured brand at the retail level," which localized promotions were effective in bringing about, because that (CX 2, p. 679):

> . . . is probably the most restrictive thing to the growth of our competition.

Promotions were key tools in reducing the price spread between ReaLemon and lower priced competing brands. During promotions the retail price of ReaLemon ordinarily dropped 10 cents or more below its regular retail price (CX 2, p. 677, 700).

113. Advertising was also to be used to prevent erosion of the ReaLemon brand in the face of competition from lower priced brands (CX 2, p. 672). Spot radio commercials were begun in 1971 in nine local markets where ReaLemon was facing competitive pressure. The radio spots were described as follows (CX 2, p. 683):

> The spot radio creative approach keyed in directly on bottled competition by telling consumers not to accept imitations, and that other bottled lemon juices may try, but none can imitate REALEMON. Commercials were executed using a conversational technique employing someone who was an impersonator and an announcer asking the impersonator to do his impression of a bottle of REALEMON. Commercials then stressed the point that no one can impersonate a bottle of REALEMON. [85]

114. In its 1973 Marketing Plan, ReaLemon's management stated that one of the crucial events affecting the company in 1972 was (CX 3, p. 736):

The recognition of other growing brands within the competitive environment, and the adoption of a positively oriented strategy to continue the growth and retain the market position of ReaLemon Lemon Juice.

The report noted that according to "SAMI" statistics ReaLemon's dollar share of the lemon juice category declined by 3.4 percentage points, from 91.4% to 88.0%, during the first seven months of 1972 (CX 3, p. 737). The pace of the decline had increased toward the end of those months as shown by the following chart (CX 3, p. 737):

REALEMON $ SHARE OF LEMON & LIME JUICE CATEGORY

	1970/1971	*1971/1972*	*SHARE POINT CHANGE*
AUG-OCT	91.4	91.1	- .3
NOV-JAN	92.6	91.3	- 1.3
FEB-APRIL	92.4	89.0	- 3.4
MAY-JULY	90.4	86.2	- 4.2

115. The 1972 Marketing Plan reveals ReaLemon's recognition that Golden Crown had become its primary competitor (CX 3, p. 738):

Competition
During 1972 the competitive environment in the lemon and lime juice category has been significantly altered versus previous years. A comparison of SAMI data between 1971 and 1972 indicates the emergence of Golden Crown as the dominant factor within this segment. [86]

	Year Ending 12/25/70	*Year Ending 12/24/71*		*7 Months Ending 8/4/72*		
			Share Point Change from			*Share Point Change from 1971-7 Mos.*
	Share	*Share*	*Change*	*$*	*Share*	*Period*
Golden Crown	1.4	2.4	+1.0	1092	5.5	+3.2
Seneca	2.0	1.5	-0.5	218	1.1	-0.7
Sunkist	2.1	1.7	-0.4	278	1.4	-0.3
All Others	2.7	3.0	+0.3	1826	4.0	+1.1

Nielsen data for the June/July period indicates that Golden Crown dollar share of the lemon and lime juice category is 5.1% while the volume share is 9.7%.

	$ Share	*Volume Share*	*All Commodity Volume % Distribution*
Golden Crown	5.1	9.7	21
Seneca	.9	1.4	5
Sunkist	1.4	1.3	9
All Others	13.0	8.0	—

Golden Crown's share in some metropolitan areas was considerably

larger than that reflected by national market share statistics (CX 3, pp. 760–61, 838). Golden Crown achieved inroads into the processed lemon juice market and into ReaLemon's market share through aggressive price competition. Golden Crown's 32 oz. size lemon juice, as noted, undersold ReaLemon by 10¢ to 30¢ per bottle (CX 3, p. 738).

116. The 1973 Marketing Plan reiterated that ReaLemon had "a dominant market position and . . . a strong consumer franchise," and stated the following among "Problems and Opportunities" for 1973 (CX 3, p. 750):

> (D) Reverse competitive inroads of Golden Crown.

Projecting an increase of cash sales of all bottle sizes for 1973 of 6 percent, ReaLemon's 1973 Plan stated (CX 3, p. 790): [87]

> These [share] gains can only be achieved *through both a reversal of Golden Crown share inroads* and increased category growth. (Emphasis added.)

117. ReaLemon's announced objective was to regain during 1973 one-half of the lemon juice market share lost to competitive brands in 1972, bringing its nationwide market share from an estimated 86.5 percent back to 89.0 percent (CX 3, pp. 790–91). The report stated that this objective was aimed at all competing brands, not just Golden Crown (CX 3, p. 790):

> [T]he share gains from reversing the 1972 trend must be viewed *not* against Golden Crown total market share but against the share of all brands other than ReaLemon. (Emphasis in original.)

118. In another part of the 1973 Plan, a seven-phase "Golden Crown Strategy" in entering new markets was outlined because (CX 3, p. 764):

> A recognition of the Golden Crown strategy will enable ReaLemon to take more positive steps in reversing the Golden Crown trend in 1973.

In order to combat Golden Crown, ReaLemon's objectives for 1973 included the following (CX 3, p. 764):

> Reducing the price differential through trade and/or consumer promotional vehicles.

The strategy was to concentrate trade (promotional) allowance spending in specific heavily competitive markets (CX 3, pp. 788, 792). Aggressive "market-by-market activities" were determined upon rather than "overall national programs." Market potential in [88] combination with "problem area analysis" were to determine the

"level" and "type" of activity required (CX 3, p. 786). The primary objective of these activities according to the Plan (CX 3, p. 786):

. . . will be to regain market share lost primarily to Golden Crown, a price oriented brand.

119. List price reductions, either nationally or on a market-by-market basis, were rejected (CX 3, p. 793). Instead, "trade deal activities" were relied upon to obtain store displays and lowered retail prices, as already indicated (CX 3, p. 781).

120. ReaLemon's "1973 Basic Plan" called for $1,604,000 to be spent on trade deal promotion, with an additional $400,000 to $800,000 being added under two alternative "President's Fund" programs (CX 3, pp. 783, 788, 799 and 832). ReaLemon attempted to determine the most effective level of case allowance activity in markets identified according to the degree of competition present (CX 3, p. 784). Thus, 1973 deal activities were to be at varying levels depending on the competition present in the market (CX 3, pp. 787, 788, 792, 817–18). ReaLemon spent $2,805,000 on 1973 promotions, or $705,000 *over* the amount previously budgeted for all promotional activity (CX 288). These trade deal promotions were directed at competitive brands in specific markets, particularly Golden Crown. Their purpose was "reversing competitive gains" (CX 3, p. 789) and "[r]eversal of Golden Crown Share Inroads" (CX 3, p. 792). Advertising was also planned for "strengthening of the consumer franchise to justify the ReaLemon price premium" (CX 3, p. 764). [89]

121. ReaLemon recognized that pricing was Golden Crown's major competitive tool. In the 1974 Marketing Plan price comparisons between ReaLemon and Golden Crown for 1973 were made as follows (CX 4, p. 854):

		February/March	*April/May*	*June/July*
Total U.S.		[¢]	[¢]	[¢]
ReaLemon	32 oz.	61.5	61.7	61.6
ReaLemon	24 oz.	63.5	63.2	61.6
Golden Crown	32 oz.	47.1	47.6	46.3

Price affected retail food store margins as well as cost to the consumer, and ReaLemon's management recognized that retailer margins were important to a competitor's ability to secure distribution, shelf space, display and feature activity (CX 4, pp. 854–55). The 1974 Marketing Plan therefore compared retailer margins for ReaLemon and Golden Crown 32-oz. bottles (CX 4, p. 855):

	April/May 1973		*June/July 1973*	
	ReaLemon	*Golden Crown*	*ReaLemon*	*Golden Crown*
Avg. Gross Price	6.75	4.40(E)	6.73	4.40 (E)
Avg. PPA Value	0	0	1.33	.25
Avg. Net Retailer Price	6.75	4.40	5.40	4.15
Consumer Cost	0.62	.48	0.62	.46
Retailer $ Margin	0.69	1.36	2.04	1.37
Retailer % Margin	9.3	23.60	27.4	31.10

It can be seen from these comparisons that ReaLemon's trade promotions, *i.e.*, price promotional allowances ("PPA"), had the effect of increasing retailer margins, tending to shift supermarket purchases back to ReaLemon, as well as the effect of decreasing retail prices. [90]

122. The 1974 Marketing Plan recited that one of the objectives of 1973 marketing activities, already described, had been to forestall growth of Golden Crown in established markets, and its expansion into new markets through more aggressive trade-oriented activities (CX 4, p. 856). ReaLemon analyzed its 1973 trade promotions, which were raised to levels 2 to 3 times above those of 1972, in terms of their effect on the expansion of Golden Crown sales (CX 4, pp. 857–58), noting that containment of Golden Crown distribution of 10-ounce and 16-ounce sizes was a major objective of the increased deal levels (CX 4, p. 857). It was concluded that the results of the program were as follows (CX 4, p. 858):

(1) Heavy deal levels on 24 oz. and 32 oz. did not preclude Golden Crown distribution growth. The degree to which this retarded even faster expansion is not known.

(2) Heavy deal levels on 8 oz. and 16 oz. may have prevented Golden Crown expansion on these sizes.

In summary, the Plan concluded that 1973 had seen the continued growth of Golden Crown in terms of share and distribution, despite a continued shift of promotional expenditures to trade deal activities in response to competitive conditions (CX 4, p. 861).

123. ReaLemon established a "Marketing Mix Strategy," again with the major objective of increasing ReaLemon's share of the market in high lemon juice per capita consumption areas (CX 4, p. 861). This objective was to be accomplished through a marketing program which utilized a combination of [91] advertising, consumer promotion and trade promotion activities (CX 4, p. 861). Specifically, ReaLemon planned to increase its market share in 4 "key Districts," New York, Philadelphia, Chicago, and Detroit. These 4 markets accounted for 38.4 percent of ReaLemon's sales and 54.7 percent of

Golden Crown's sales during February-July 1973 (CX 4, p. 864). The objective was to reduce Golden Crown's market share by 20 percent, or from 18 percent in 1973 to 14 percent in 1974, while ReaLemon's share was to rise from 71 percent to 75 percent. ReaLemon's 1974 Plan stated (CX 4, p. 864):

The share objectives are to reduce Golden Crown share by 20%.

ReaLemon concluded that the above major metropolitan areas represented "high development of Golden Crown" and the "highest per capita consumption markets of lemon juice," and that by aiming at those markets ReaLemon would have the following effect (CX 4, p. 864):

Decreasing Golden Crown effectiveness in these markets may result in significant reduction of expansion leverage.

Trade deal levels in the above four key areas of New York, Philadelphia, Chicago, and Detroit were to be continued at $2.25 per case, as part of the effort to reduce Golden Crown's share by 20 percent, but trade deals in all other areas were to be reduced by approximately 30 percent (CX 4, p. 872).

124. The 1974 Marketing Plan reviewed the "overall advertising and promotion budget" for the years 1972 through 1974. The figures reviewed show [92] great increases in all categories of promotion, especially in the trade deal (price promotion allowance) areas, as follows:

	1972 *$*	*1972* *%*	*1973* *$*	*1973* *%*	*1974* *$*	*1974* *%*
Bottled Lemon Juice	2197	81.3	2465	83.9	4147	90.5
Working Adv.	765	28.3	389	13.2	1201	26.2
PPA & Co-Op & F.G.	1341	49.6	1961	66.7	2238	48.9
Consumer Promo.	0	0	21	.7	558	12.2
Other Expenditures	91	3.4	94	3.2	150	3.3

See CX 4, p. 865. These great increases were directed at competition, had the purpose of maintaining ReaLemon's predominant share of the processed lemon juice market, and were aimed in particular at Golden Crown (CX 4, p. 866). The Plan specifically stated that the "Trade Deals" and "Consumer Promotion" elements of the program

had an area of major effectiveness to *"Directly Combat Golden Crown"* (CX 4, p. 866).

125. Money for ReaLemon promotions was budgeted for 1974 at $2,888,000, an increase of $788,000 over 1973, which included $2,238,000 for trade deals and about $558,000 for consumer promotions (couponing) (CX 4, pp. 887-88; CX 288). This increase was clearly directed at competitive brands, in particular, Golden Crown (see, for example, CX 4, p. 866). Indeed, the expenditures of ReaLemon for advertising and promotion grew, between 1967, which year marked the "advent of competition" (CX 1, p. 646), and 1974, from $2,277,000 (CX 1, p. 646) to $4,379,000 (budgeted - see CX 288), an almost 100 percent increase.

126. As stated in earlier sections, in 1974 ReaLemon planned to increase its wholesale list prices, but not in the "highly competitive Golden Crown markets." The 1974 Plan stated (CX 4, p. 873): [93]

> . . . ReaLemon bottled 32 oz. will be increased in markets accounting for only 50% of total volume. The 50% of volume not increased represents the highly competitive Golden Crown markets concentrated in Region 1 and part of Region 2.

127. Robert Taft, former Regional Sales Manager for ReaLemon in the Northeastern United States, testified that Golden Crown was regarded as a serious threat to ReaLemon in the Northeast in 1972, and he considered that it was his objective as a ReaLemon employee to restrict the growth of Golden Crown insofar as necessary to maintain ReaLemon's "historic market share." He estimated that in 1971 and 1972 ReaLemon's market share in the Northeastern markets was in excess of 75% (Taft, Tr. 1317-19).

128. ReaLemon National Sales Manager expressed on many occasions in communications with Borden or ReaLemon personnel his determination to preserve ReaLemon's traditional market position in the face of Golden Crown competition. In July 1974 ReaLemon's National Sales Manager wrote to one of his Regional Sales Managers of his concern that ReaLemon's share of the Pittsburgh market had fallen to 85% (CX 81, p. 7316):

> I am attaching the April/May and May/June SAMI figures for Pittsburgh.
>
> * * * * * * *
>
> The Golden Crown sales figures tripled . . . while our quart figures . . . went up very slightly.
>
> At this time we have continued to go down in market share to where we are now at only 85%. I would like your comments.

[94] In October of 1971, the National Sales Manager wrote to Mr. Bud Crane about the Detroit market (CX 81, p. 7308):

Isn't there something we can do at the store level to slow them [Golden Crown] down a little.

In January 1972 he admonished ReaLemon's New Orleans broker to do his best to see that Golden Crown did not secure any "placements" in the New Orleans area, as follows (CX 161):

We know that you will stay right on top of this situation and do your best to see that they [Golden Crown] do not secure any placements but in the event they would, I know you will make certain we are clobbering them at retail.

On June 6, 1972, ReaLemon's National Sales Manager wrote to another Regional Sales Manager (CX 81, p. 7289):

I trust that we are doing everything possible to see no further such quantities of Golden Crown are shipped into these [Miami, Jacksonville, and Birmingham] markets.

Several months earlier he had written to the ReaLemon broker in Detroit (CX 81, p. 7307):

Do you have any brilliant ideas how we can more effectively combat this [Golden Crown movement] at the store level.

In November 1973 ReaLemon's National Sales Manager reported to an official of the Borden Foods Division in the Chicago area on the progress of the effort to [95] restrain Golden Crown in major metropolitan areas in the Midwest, as follows (CX 81, pp. 7478–79; emphasis added):

CHICAGO

. . . I am confident that with the momentum we are building right now that we are going to be in excellent shape in 1974 to expand ReaLemon sales in the Chicago area *and at the expense of Golden Crown.*

DETROIT

. . . I am confident that we can pick up with some programs that are not only going to enhance our sales in the area *but are going to substantially to detract from Golden Crown sales.*

* * * * * * *

MILWAUKEE

Milwaukee is pretty much the same as Indianapolis and here again, I think it is just a matter of getting a little more cooperation on the part of the trade during our promotions *to again begin increasing ReaLemon at the expense of Golden Crown.*

* * * * * * *

ST. LOUIS

Golden Crown secured some new distribution in this area and as a result we slipped somewhat. . . . [W]e [96] are going to have to try harder to get straight truckloads of ReaLemon shipped to the major accounts in the area during our promotional periods and at the same time make certain that ReaLemon is the item to be promoted at key times during the year.

In another letter on the same date to a Borden Foods Division official in New York City, the ReaLemon National Sales Manager reported on progress restraining Golden Crown in major East Coast markets (CX 81, pp. 7439–40; emphasis added):

* * * * * * *

PHILADELPHIA

I am confident that we can begin curtailing their [Golden Crown] growth. . .

* * * * * * *

PITTSBURGH

Here we have made nice progress not only increasing ReaLemon sales dramatically *but also lowering Golden Crown's share.*

BOSTON

. . . I am confident that from this point on *we can contain any additional Golden Crown growth* and begin rebuilding ReaLemon sales. [97]

* * * * * * *

BUFFALO

. . . I am confident . . . that our holiday promotion is going to start reversing this trend as I think Golden Crown has gone about as far as they can . . . and from hereon it is just a matter of getting ReaLemon promoted as often as possible which will not only increase our sales but *at the same time begin substantially slowing down Golden Crown.*

129. The Regional Sales Manager of ReaLemon based in Jacksonville, Florida, instructed the ReaLemon broker in Miami in January 1972 to take steps to retard Golden Crown expansion (CX 132):

. . . The Golden Crown deal with Hills Bros. . . . You may use some free goods (QUARTS) to work the Hills stores. Order these quarts and make sure the large stores have floor displays on our quarts. Work this out to [sic] the price is at 69¢ with the free goods. If Golden Crown does not move at Hills, I am sure that Charley will not continue the deal until June 24th.

130. In August 1971 another ReaLemon Regional Sales Manager responsible for the Minneapolis area wrote the ReaLemon broker in that area planning methods to restrict or exclude Golden Crown, pointing out ReaLemon's success in that effort elsewhere (CX 81, p. 7293): [98]

In many areas where they [Golden Crown] attempted to gain a foothold we were quite instrumental by putting a concentrated effort at all levels in keeping their sales to a minimum and in many cases they left the market completely.

B. ReaLemon Utilized Discriminatory Area Pricing and Promotions To Hinder and Restrain Competing Brands and To Maintain Its Monopoly Power

The record of this proceeding demonstrates a course of conduct undertaken by respondent Borden, through ReaLemon Foods, to hinder and restrict the ability of other processed lemon juice marketers, particularly Golden Crown, to compete in local and regional markets. The specific activities and practices revealed by the record took place primarily in the Northeastern region of the United States, and particularly in the cities of Philadelphia and Buffalo, and included the following:

1. Different list prices were maintained in different areas to combat competition

131. ReaLemon processed lemon juice is marketed under a zone pricing system. The country is divided into three zones, each with separate list prices. Zone 2 generally encompasses the Northeastern portion of the United States, Zone 1 includes North Central and Midwest states, and Zone 3 covers the South and West. In the past ReaLemon lemon juice has been priced up to 35 cents per case lower in Zone 2 than in Zones 1 and 3, which ordinarily have had identical prices (CX 37–54). Prices in Northeastern areas have been lower than those in the remainder of the country despite the fact that Borden's average cost of manufacturing cases of ReaLemon quarts was 19 cents more at its Eastern plant than at its Chicago plant in [99] 1971, 17 cents more in 1972 and 4 cents more in 1973 (CX 293). Nor did this price differential result from a lower cost of distribution in the Northeastern region, for prices in that region were lower than those in the remainder of the nation even for goods sold FOB plant or picked up by the buyer at the plant (CX 37–54). In short, in the Northeast where ReaLemon faced Golden Crown competition beginning around 1971, ReaLemon maintained lower list prices than in the balance of the country.

132. The price lists in the record show that ReaLemon had a uniform nationwide pricing system in 1967 and 1968 (CX 34-36), moved to a two-zone system in 1969 (CX 38), and instituted the present three-zone system in 1970 (CX 37, 39-54). Previously in the 1950's prior to acquisition by respondent, ReaLemon had utilized zone pricing "to more closely meet the Sunkist [processed lemon juice] price" in the Eastern United States (Saving, Tr. 2586-87). In 1958 Sunkist retrenched in its processed lemon juice marketing because of the "highly competitive" situation it faced (Delaney, Tr. 682), and now markets that product in the Southwest, mainly California and Texas (Delaney, Tr. 681). The zone pricing system allowed Borden to maintain lower list prices in areas where it faced competitive pressures. See ReaLemon's 1974 Marketing Plan, which has been quoted earlier, in which price increases were instituted in those portions of the United States where ReaLemon had little competition, but were not made in "highly competitive Golden Crown markets" (CX 4, p. 873). In other words, respondent Borden maintained lower prices in some geographic markets to combat competition of other processed lemon juice brands, particularly Golden Crown. [100]

2. Different promotional allowances were maintained in different areas to combat competition

133. Since at least 1969 ReaLemon has offered three or four trade promotions per year. These trade promotions were used primarily to increase sales of the 32-ounce size of ReaLemon reconstituted lemon juice (or the 24-ounce size in areas where it is the largest size sold), and usually covered the periods around Memorial Day, midsummer, and Thanksgiving-Christmas, with a fourth during Lent having been added in 1973 (CX 9-11, 14-20, 22-29, 31-33; Peters, Tr. 1787-88). Promotional allowances were offered on an off-invoice, bill-back, or off-invoice plus coupon basis, or a combination thereof (CX 9-11, 14-20, 22-29, 31-33; Peters, Tr. 4465). ReaLemon sold approximately 71 percent of its largest selling 32-ounce size "on deal" in 1972, 84 percent in 1973 and an estimated 77 percent in 1974 (CX 4, p. 872).

134. Promotional allowances are intended to induce a retailer to promote the manufacturer's product or to offer it for sale at a reduced price (Saving, Tr. 2516). Some of ReaLemon's promotions did not require promotional services by the retailer, and buyers could accept the allowance, but promote the product only if to do so were of value to them (Saving, Tr. 2514-16). For those promotions which did require performance, one of the performance options was generally a

reduced retail price (Saving, Tr. 2541). ReaLemon's price promotions essentially amounted to price reductions (Peters, Tr. 4480).

135. During the late 1960's, ReaLemon's price promotional allowances were offered on a uniform nationwide basis, and gradually increased from an average of 60¢ a case to about 90¢ per case (Peters, Tr. 4467–68). [101]

136. In 1971 ReaLemon switched from a uniform national promotion program to a policy of tailoring promotions to particular marketing areas, and increased the allowance in the summer of 1971 to $1.25 per case in 15 of its highest volume Eastern markets (CX 3, p. 783). It was in these Eastern markets that ReaLemon faced growing competition, and the increased allowance was intended to combat such competition by reducing the retail price spread between ReaLemon processed lemon juice and its competition in those areas (CX 1, p. 656).

137. After returning briefly to a nationwide promotional basis, ReaLemon for the 1972 Thanksgiving-Christmas program again began using local promotions and increased the level of its allowances on the 32-ounce and 24-ounce sizes in a number of metropolitan areas (Peters, Tr. 4470–71). Higher allowance levels of 90¢ per case for one promotion and $1.80 for two, were offered in New York City, Hartford, Philadelphia, Cleveland, Pittsburgh, Baltimore, Detroit and Chicago (CX 19, 23, 180). Of these cities all except Pittsburgh were listed as "Highly Competitive Markets" in ReaLemon's 1973 Marketing Plan (which was written in September 1972). Pittsburgh was listed in that document as a "Moderately Competitive Market" (CX 3, p. 838). Allowances of 75¢ for one promotion and $1.25 for two, less than those mentioned above, but greater than those available in the remainder of the country, were offered in Milwaukee and Atlanta, two cities classed as "moderately competitive" (CX 19, 23, 180; CX 3, p. 838). The remaining less competitive areas of the nation were offered a substantially smaller allowance of 60¢ for one promotion and 90¢ for two (CX 19, 23, 180). [102]

138. ReaLemon's President testified that the increased allowances offered during the Thanksgiving-Christmas period of 1972 were utilized in order to regain sales lost earlier in the third quarter of 1972, when allowance levels had been reduced to 60 cents per case (CX 22, 180), and to allow ReaLemon's brokers, who were about to be replaced by Borden's direct sales force, to increase their commissions in their final year (Peters, Tr. 4470–71). However, those reasons cannot apply to those areas where the allowance remained at the 60 cents per case level. It is clear from the Marketing Plans already

discussed, on the contrary, that the increase in promotional allowance in selected markets in 1972 and later years was an effort to restrict sales of competing brands in those markets, primarily of Golden Crown, by lowering the price differential between ReaLemon and such brands.

139. In 1973 ReaLemon retained the promotional differentials, with the highest allowances available in its most competitive markets. During the spring promotion of that year, an allowance of $1.50 per case of quarts was offered in the highly competitive cities of the Northeast and North Central regions (CX 27-28, 180). In Philadelphia, the deal level was further increased after its announcement to the trade, when in March 1973 Borden's Philadelphia district manager advised Borden's customers that the announced 32-ounce promotion would be raised to $1.80 (Sankey, Tr. 4731-32; RX 561). An even higher allowance level, of $2 per case of quarts, was offered in Atlanta, Florida and Dallas, with $1.50 levels prevailing everywhere else in the Southeast (CX 27-28, 180). Atlanta, Dallas and three cities in Florida, Miami, Tampa and Jacksonville, as well as several other cities in the Southeastern region, were listed as "Moderately Competitive Markets" in the 1973 Marketing Plan (CX 3, p. 838). Jacksonville/Tampa, Atlanta and Birmingham were also categorized as "Well Developed" Golden Crown markets in that same document (CX 3, p. 760). [103]

140. Deal levels prevailing in markets where significant competition was not present provided only for allowances of 50¢, 75¢ and 90¢ on 8-ounce, 16-ounce and 32-ounce sizes of ReaLemon, respectively (CX 27-29, 180). Promotion allowance levels were thus tailored to combat the particular competitive condition found in local or regional areas, with deal levels increasing markedly in those areas in which Golden Crown or another competitive brand of lemon juice was either a significant factor or attempting to establish a foothold.

141. ReaLemon's policy of offering higher promotional allowances in areas experiencing competition from Golden Crown continued during the price promotion of July-August 1973. One of the options available to customers in New York City and the Philadelphia area was a $1.80 per case allowance on quarts plus one case free with every 15 purchased (CX 29; CX 4, p. 893). As had already been stated, Philadelphia was listed in the 1973 Marketing Plan as a "Highly Competitive Market" (CX 3, p. 838). New York City was also listed as "Highly Competitive," and was ReaLemon's highest volume market in dollar sales (CX 3, p. 838). Other areas received substantially lower allowances than those granted in

competitive areas in the North Central, Southern and Colorado regions (CX 29; see CX 3, pp. 760, 838).

142. The winter of 1973 saw promotional allowances reach their highest level of $2.25 per case in selected cities (Peters, Tr. 4473–76; CX 30). Such allowances were granted to customers in the Northeast and in the City of Chicago (the remainder of the district containing Chicago received only $1.20 per case). Florida, North Central areas and most large metropolitan areas were given allowances of $1.50, the remainder of these latter districts receiving allowances of 75¢ per case. Areas of the West in which little competition was present were offered allowances of only 60¢, 75¢ and 90¢ on the 8-, 16- and 24-ounce sizes (CX 31).

143. The spring 1974 promotion followed the pattern of that in the winter of 1973, except that the highest allowance offered was $2. New England, [104] New York City, Philadelphia and Chicago were offered this allowance. New York State, Western Pennsylvania, the Middle Atlantic States, Michigan, Indiana, Ohio, Florida and Denver received $1.80 per case; remaining areas were offered only from 90¢ to $1.50 per case (CX 33).

144. ReaLemon's 1974 Marketing Plan identified four "key Districts," accounting for a large percentage of both ReaLemon's and Golden Crown's sales volume, in which ReaLemon was determined to increase its market share at the expense of Golden Crown. It was hoped that checking Golden Crown in these areas would impair its ability to expand into other markets (CX 4, p. 864). In fact, three of these four cities, New York, Philadelphia, and Chicago, were among the five areas in the winter 1973 promotion, and four areas in the spring 1974 promotion, which were offered the highest allowances available, that is, $2.25 and $2 per case, respectively. The fourth of these cities, Detroit, received in both promotions an allowance of $1.80 per case, higher than that offered customers in many other areas of the nation (CX 31, 33; CX 4, p. 894).

145. In accordance with the strategies set forth in the marketing plans heretofore discussed, Borden used its price promotional allowance (PPA) program to combat Golden Crown and other brands of reconstituted lemon juice. Large per case promotional allowances, as described, much increased over levels prevailing before the advent of substantial competition from other brands of lemon juice, were offered in those areas where competition was present, while customers in areas not experiencing competition were offered much lower promotional allowances. ReaLemon's customers treated the promotional allowances as net wholesale price reductions and took account of the allowances in calculating the net cost for the item

(Lemmerman, Tr. 978; Gerace, Tr. 1992–2021; CX 203–215; Moreland, Tr. 1036–1117; CX 219; CX 310; CX 312; H. Greenberg, Tr. 1214–38, 1248). These price [105] reductions were reflected in the retail price of ReaLemon. Prices on its 32-ounce size, which after an April 1971 price increase regularly ranged from 69 cents to 79 cents in supermarkets, with the reduced prices on "special" in the 59-cent to 69-cent range (CX 2, p. 677), declined to the 39-cent to 49-cent range in some markets in 1973 and 1974 as a result of the increased promotional allowances (CX 81, pp. 7306, 7458, 7461, 7463, 7471, 9038; CX 93, 101, 181–183, 188–189, 191, 312).

146. As emphasized herein, since ReaLemon was by far the dominant and premium brand, elimination or reduction of its retail price, and the consequent narrowing or elimination of the price spread between it and brands with little or no consumer acceptance, had the capacity to hinder or stop sales of the latter.

3. Different net prices were charged different customers to combat competition

Philadelphia

147. Acme Markets, with a 20 to 28 percent share of the Philadelphia retail grocery market, was the largest supermarket chain and price leader in that city (Vinocur, Tr. 2098–99; H. Greenberg, Tr. 1184). Philadelphia, as has previously been noted, was one of ReaLemon's high volume markets and one listed in ReaLemon's Marketing Plans as "Highly Competitive." In 1972, 1973 and 1974, ReaLemon granted to Acme Markets in Philadelphia promotional allowances greater than those offered or given to competing Philadelphia area food retailers. The purpose and effect of the higher promotional allowances granted Acme in 1972 was to keep Golden Crown out of Acme supermarkets by, in effect, selling Acme its requirements of bottled lemon juice. An additional purpose after 1972, when Acme did stock [106] Golden Crown, was to hinder sales of the latter by narrowing or eliminating the price spread between ReaLemon and Golden Crown, as well as any other competing brands. The details of these promotional allowances are discussed below.

148. Until the end of 1973, ReaLemon had a cooperative ("coop") advertising allowance program in addition to its seasonal price promotional allowance programs (Peters, Tr. 4480–82). Under the coop program, customers would accumulate money for each case of ReaLemon purchased during the year. The accrual rates for 1971 through 1973 were 15 cents per case of quarts, 12 cents per case of 24-

ounce bottles, 17 cents per case of 16-ounce bottles, 14 cents per case of 12-ounce bottles and 11 cents per case of pints (Peters, Tr. 4481; CX 62, 70, 74). A record of each customer's accruals was maintained by Borden. The customer could earn and receive his money by rendering advertising or promotional performance specified by agreement with Borden, and by submitting a request to Borden for payment (Peters, Tr. 4481; CX 62, 70, 74, 94–100).

149. In 1972 Acme Markets in Philadelphia was granted a 60-cent per case coop allowance for a special purchase of ReaLemon quarts in May or June of that year. This amount is four times the normal 15-cent coop accrual on quarts. Acme sent its trucks to ReaLemon's Bridgeton, New Jersey, plant to pick up the lemon juice and delivered the product directly to its stores. Mr. Taft, the Regional Sales Manager for Philadelphia, described the transaction and testified that although it was originally set up on a bill-back basis, he believed Acme had deducted the allowance from its payments for the order rather than billing back (Taft, Tr. 1299–1301; CX 303, p. 20).

150. During the same time period, Food Fair Stores in Philadelphia received a 50-cent per case coop allowance on ReaLemon quarts for the spring promotion (Taft, Tr. 1303–1304; CX 100; CX 303, p. 18). [107]

151. Mr. Taft testified that the higher allowance "could" have been given to Acme for competitive reasons, for most of the promotional programs were designed to "maintain ReaLemon's position against increasing competition" (Taft, Tr. 1305–1308). At first Mr. Taft indicated that Acme received the extra 10 cents per case allowance because it picked up the lemon juice from the ReaLemon plant, but Food Fair also picked up from the ReaLemon plant as did most ReaLemon supermarket customers in the Philadelphia area (Taft, Tr. 1304–1305, 1309–1310, 1322–1323; Friedland, Tr. 1497–1498). The decision to offer Acme the 60-cent allowance was discussed with Mr. Saving, ReaLemon National Sales Manager, and Mr. Vinocur, Acme Accounts Executive for the ReaLemon broker in Philadelphia (Taft, Tr. 1308). Mr. Taft further testified that because of the allowance, Acme made a very heavy purchase of ReaLemon processed lemon juice. As a result, in Taft's words (Tr. 1310):

> . . .The substantial distribution effectively shut out, for the summer, the purchase of Golden Crown because they [Acme] put so much in the stores they [Acme] weren't going to be in the market until at least September or October.

* * * * * * *

Q. They, being Golden Crown?

A. They wouldn't be in the market to entertain another competitive lemon juice for some time.

Q. Acme would not be in the market? [108]

A. Acme would not be in the market because the distribution of the range [sic] was substantial. If my recollection is correct, it was approximately 130 stores or 150 stores, and over a hundred of those got 2 pallets, which also, if my recollection is correct, would be 110 cases, and that is a fairly substantial amount to carry a single, given store for quite a time, depending on the weather. If you got 110 degree weather for a week, it might not be so long.

Because of Acme's purchases of ReaLemon, Mr. Vinocur advised Mr. Taft, Acme was unable to take advantage of two "lucrative presentations," presumably made by representatives of competitive lemon juices (Taft, Tr. 1310–11; CX 111).

152. Taft testified that Food Fair would have received the same 60-cent allowance given to Acme had Food Fair "achieved a similar performance figure" (as Acme), because it would "have helped our competitive situation there" (Taft, Tr. 1322). In other words, had Food Fair purchased a similar amount of product and distributed it directly to its stores, with the result that those stores "were what you might call stocked with lemon juice for a fairly considerable period of time" (Taft, Tr. 1324), it would also have received the additional allowance (Taft, Tr. 1322–24). Although Mr. Taft testified that there was no express agreement by Acme not to purchase a competitive lemon juice, it was his understanding that, as a result of the promotion, Acme would not purchase another brand at least for the year 1972, because it had purchased so much ReaLemon as not to need to purchase any other brand (Taft, Tr. 1341–42). In fact, Acme did not purchase Golden Crown processed lemon juice in 1972 (Moreland, Tr. 1020–21). [109]

153. In May of 1973, Acme purchased, in two transactions, 2,500 cases of ReaLemon quarts for which it paid a net price of $3.65 per case, which was list price of $6.45 less a $2.80 per case deduction taken off invoice (CX 219, pp. 218–230). At the time the listed promotional allowance of ReaLemon was $1.80 off invoice, producing a net price of $4.65 per case (RX 561). This was the price paid by Acme's competitors, Frankford-Quaker and Penn Fruit (CX 218, p. 1; H. Greenberg, Tr. 1198–99).

154. In December 1973, Acme purchased 1,815 cases of ReaLemon quarts for which it paid $3.20 per case, which was list price of $6.45 per case less a $3.25 deduction taken off invoice (CX 219, pp. 288–293). The listed ReaLemon promotional deal at the time, however,

was only $1.00 per case off invoice plus $1.25 bill-back (CX 31), producing a total of $2.25 per case allowance received by Frankford-Quaker and Penn Fruit (CX 218, pp. 8–10; CX 312; H. Greenberg, Tr. 1200).

155. In the foregoing transactions, as the figures disclose, Acme received a lower price by $1.00 per case than Frankford-Quaker and Penn Fruit. As a result, not only were Acme's orders of ReaLemon very substantial, but the retail price of ReaLemon in Acme supermarkets in the Philadelphia area was lowered to 39¢ per quart in December 1973, which may well have eliminated the price spread between respondent's premium ReaLemon brand and competing brands, particularly Golden Crown, tending to hinder and restrict sale of the latter and tending to maintain or enhance ReaLemon's historic market dominance (see CX 4, p. 855, where respondent's 1974 Marketing Plan lists the average consumer cost of Golden Crown, quart size, in 1973 as 46¢ to 48¢). In a letter to its stores, in connection with the second transaction above, announcing a reduced price feature of 39¢ (from a regular price of 55¢) on ReaLemon quarts from [110] December 16 to December 25, 1973, Acme stated that it had been granted an allowance of $3.25 per case (the full amount of its deduction) off invoice for 4 weeks (CX 93). Acme, as noted, is the dominant supermarket chain in the Philadelphia area and the price leader.

156. In connection with the foregoing findings, respondent Borden contends that the $1.00 per case more than the listed allowance which Acme took off invoice in May and December 1973 purchases is due to deductions by Acme of accrued coop allowances. Borden's district sales manager in Philadelphia, Robert Sankey, testified that, with Borden's acquiescence, Acme took all its ReaLemon allowances off invoice, deducting accrued coop monies periodically "as they saw fit" (Sankey, Tr. 4732–33). Whatever the fact may be in this respect (see proposed findings of complaint counsel, Nos. 164 and 186, and respondent's reply memorandum at pp. A45–A51), Acme was allowed by ReaLemon Foods to deduct $1.00 per case off invoice which Frankford-Quaker and Penn Fruit were not, and such deductions by Acme were in direct contravention of Borden's established procedures for the cooperative advertising program. To receive cooperative advertising payments, certain specific promotional efforts had to be undertaken, and proof of performance submitted to Borden with a request for payment, as follows (CX 70; see also CX 74):

Completed Certificate of Performance, with copies of proof of performance (tear sheets, store bulletins, T.V. or radio script, window banner, handbill, mailing

material, etc. as applicable) must be submitted within 60 days after close of performance period. Certificate of Performance should be submitted to ReaLemon Foods by wholesalers, distributors, other direct buying customers and retailer [111] customers of non-participating wholesalers or distributors. ReaLemon reserves the right to refuse payment on all Certificates of Performance received 60 days after the end of the performance period.

In conformity with FTC Guide 13, ReaLemon Foods reserves the right to spot-check performance under this promotion. ReaLemon Foods will issue a check to the customer for promotional services rendered. *No deductions from remittances will be allowed.* ReaLemon Foods reserves the right to withdraw this offer at any time. Upon completion of performance, sign and submit ReaLemon Certificate of Performance along with proof of performance for payment under the terms of this offer to ReaLemon Foods, 1200 West 37th Street, Chicago, Illinois 60609. (Emphasis added.)

Other accounts in the Philadelphia area, such as Penn Fruit, in accordance with Borden's "Cooperative Merchandising Offer", received payments of coop money by check from ReaLemon after sending a request for payment accompanied by proof of performance (RX 364, 365). The record contains no evidence that Acme was ever required by Borden to justify its deduction with proof of performance.

157. Acme markets in Philadelphia purchased quarts of ReaLemon reconstituted lemon juice at $4.20–$4.25 a case or $2.25 off list price in the spring of 1974 when other retailers in the Philadelphia market received only $2.00 a case off list price (CX 219, pp. 321–330, 332–36, 338, 340, 344, 346, 349, 350; Leahy, Tr. 836; CX 101A; CX 312). The ReaLemon published promotion for District 14, which includes Philadelphia, offered only $2.00 off invoice on cases of 32-ounce ReaLemon [112] purchased between April 22 and May 17, 1974 (CX 33). The deal was announced to Borden's regional and district offices by Harold Saving, ReaLemon's National Sales director, on February 28, 1974 (CX 33).

158. On February 13, 1974, Borden salesman, J. J. McNulty, offered Acme an allowance of $2.25 per case on orders made between April 22 and May 10 (CX 219, p. 321). Subsequently, on March 12, 1974, McNulty made Acme another offer of $2.00 per case allowance off-invoice plus an additional 25 cents off invoice for the regular purchase dates of April 22 to May 17, 1974, with a suggested retail feature price to the public of 43 cents (CX 219, p. 322). Acme began deducting the $2.25 per case from invoices dated March 21. Between March 21 and May 21, Acme was invoiced for almost 16,000 cases of ReaLemon quarts of $2.25 off list price and 25 cents over deal price (CX 219, pp. 323–330, 332–36, 338, 340, 342, 344, 346, 349, 350).

159. Frankford-Quaker and Penn Fruit, as already indicated, two of Acme's competitors in the Philadelphia market (Vinocur, Tr.

2093-94), purchased ReaLemon at $2.00 off invoice (the regular allowance) during the spring of 1974 (CX 101A; CX 312). Frankford-Quaker purchased 3,080 cases at deal ($2.00 off) price (CX 101A). Penn Fruit was offered $2.00 off invoice on one order shipped before March 20 and $2.00 off invoice on purchases between April 8 and May 17, 1974, and purchased 550 cases in March and an additional 2750 during the deal period (CX 312).

160. Again, the preferential treatment accorded Acme resulted in the movement of a very substantial quantity of ReaLemon bottled lemon juice, 16,000 cases worth $67,000 or more, into the Philadelphia market and onto the shelves of the area's dominant supermarket chain. A reduced retail price of 43¢ per quart was [113] sought by ReaLemon, lower than the average retail of Golden Crown of 46¢ to 48¢ per quart in 1973, as noted earlier. The purpose and tendency to maintain ReaLemon's dominant market position is evident.

Buffalo

161. Niagara Frontier Services ("Niagara") owns or franchises Tops Markets, which is the largest volume supermarket in the Buffalo, New York area (Gerace, Tr. 1982; Springer, Tr. 1847). It purchased ReaLemon quarts at a total net cost of $4.40 per case from 1968 to 1972, and the price it paid never exceeded $4.45 until August 1974 (Gerace, Tr. 2061; CX 203-215). It paid a low price of $4.05 per case for ReaLemon quarts in December 1973 (CX 212). Niagara's grocery buyer testified that he bought ReaLemon quarts at the consistent price of about $4.40 per case during the entire period he was responsible for Niagara's grocery purchases, from 1968 to 1972 (Gerace, Tr. 1984, 1991-92, 2023-26, 2061). In 1973 and 1974 Niagara also purchased ReaLemon quarts around $4.45 per case, except for a purchase in August 1974 which was at $4.85 per case (CX 211-214). According to Niagara's grocery buyer, the competitive retail feature price of ReaLemon was 37 to 39 cents per quart in Niagara's Tops Markets, and a $4.40 per case wholesale price was necessary to sell at that price level (Gerace, Tr. 2023-24, 2026). The established price at which Niagara bought the product through May 1974 was $4.40 or $4.45, as stated, and the ReaLemon broker used off-invoice allowances, bill-backs and free goods to get the price down to that level (Gerace, Tr. 2023-24).

162. In contrast, the prices paid for ReaLemon quarts by the wholesaler, S. M. Flickinger Co., which supplied competing retail grocery firms in the Buffalo area, including Super Duper Markets, the second or third largest supermarket chain in Buffalo (Gerace, Tr. 1982; Springer, Tr. 1847), were consistently [114] higher, often by as

much as $1.00 or $1.50 per case except for one purchase in August 1974 (CX 204 through 214; CX 216).

163. In 1972, ReaLemon offered Niagara a coop allowance of 60 cents per case on cases of ReaLemon quarts purchased between January 1 and September 30 (CX 303, p. 24). Niagara, like Acme, was allowed by Borden to deduct this 60 cents per case off invoice throughout 1972, during which it purchased 5,500 cases (CX 204, 205, 210, 215).

164. The former Regional Sales Manager of ReaLemon responsible for the Buffalo area testified that the 60 cents per case allowance to Niagara was "very similar to the Acme picture [in Philadelphia]" (Taft, Tr. 1313). He described the effect of this transaction with Niagara (Taft, Tr. 1313–14):

. . .[Niagara] purchased this amount of course in sufficient volume to sustain them throughout, on this basis, an anticipated period of several months.

Q. As a result of this allowance did Niagara Frontier Services purchase unusually large quantities of ReaLemon during the period in question?

A. The quantities were unusually large to be purchased in such a small period of time. Normally, the quantities would have been purchased over a longer period of time, had it not been for the allowance.

Q. Was the effect of this large purchase the same as you have noted with respect to the Acme situation? [115]

A. To the best of my knowledge and recollection, *there was no other competitive lemon juice sold by that concern called Niagara Frontier Services, at least, through October 1972.* (Emphasis added.)

As in the case of Acme, there was no explicit agreement between Niagara and ReaLemon that the former would not purchase a competing brand of lemon juice in return for an extra allowance (Taft, Tr. 1342; Gerace, Tr. 2052). Taft explained his understanding of the situation as follows (Tr. 1342–43):

A. The situation between Acme and Niagara were similar, so whatever I actually stated with respect to Acme would apply there. It was our understanding or belief there were no agreements and nobody said, as a result of this promotion you cannot purchase any other lemon juice product — this was not done. This was done on a basis, assumption, that under this arrangement, with the purchases they would make, *they would not really be in a position to buy anything else.* It did not mean they couldn't. (Emphasis added.)

165. Buffalo, like Philadelphia, was a city in which ReaLemon faced substantial competition from Golden Crown. As early as the 1971 Marketing Plan, it was noted that ReaLemon's market share in

Buffalo had fallen from 100 percent to 81.3 percent during 1970 in the face of competition from Golden Crown (CX 1, p. 640). [116]

Miami

166. In early 1972 the ReaLemon broker in Miami and ReaLemon's Regional Sales Manager in charge of that area took steps to obtain commitments from retail food stores to reduce ReaLemon retail prices on quarts to 69 cents (CX 130, 131). ReaLemon's Regional Sales Manager wrote (CX 131):

> In talking to the buyers, it looks like we definitely will be getting a 69¢ retail *and we hope this will be one of the answers to eliminating some of our friends from the marketing.* (Emphasis added.)

167. At about the same time, in a transaction already described, the ReaLemon Regional Sales Manager referred to a Golden Crown "deal" with a large supermarket, Hills Bros., stating (CX 132):

> The Golden Crown deal with Hills Bros. I mentioned to your Dad on the phone this week. You may use some free goods (QUARTS) to work the Hills stores. Order these quarts and make sure the large stores have floor displays on our quarts. Work this out to the price [sic] is at 69¢ with the free goods. *If Golden Crown does not move at Hills, I am sure that Charley will not continue the deal until June 24th.* (Emphasis added.)

This action of ReaLemon plainly was for the purpose of preventing "movement" of Golden Crown in the Hills Bros. supermarkets by lowering the retail price of ReaLemon's premium brand. [117]

4. Sales were made at unreasonably low prices to combat competition

Complaint counsel have attempted to prove that Borden engaged in predatory conduct by selling ReaLemon's 32-ounce size to Acme markets in Philadelphia and to Niagara Frontier Services (Tops Markets) in Buffalo at prices below Borden's average variable costs for that product (see Dr. Mann, Tr. 494–98).

168. Costs of manufacturing a product can be divided into two types: fixed costs and variable costs. Variable costs are those which vary with the level of product or output, such as the costs of ingredients, containers, labels and labor incurred in producing the product, packing charges paid to third parties for supplying the labor for manufacturing a product, distribution or shipping costs, and that portion of selling expenses which varies with level of production or output (Dr. Mann, Tr. 905–906; Goluszka, Tr. 4453–54; Dr. Greenberg, Tr. 2791–93; Dr. Kamien, Tr. 5766). Average variable cost refers to the total of variable costs divided by the product output of a

firm over some period of time (Dr. Mann, Tr. 905; Dr. Greenberg, Tr. 2791). Short-run average variable costs are those costs incurred once the production unit of the plant is completed and ready to begin operations (Dr. Mann, Tr. 905).

169. Fixed costs are those costs which do not change within a relatively short period of time with the level of production or output (Dr. Kamien, Tr. 5766; Goluszka, Tr. 4453; Dr. Greenberg, Tr. 2791). Manufacturing overhead and administrative overhead are both fixed costs (Goluszka, Tr. 4454; Dr. Greenberg, Tr. 2792–93). To the extent that selling expenses include costs which do not vary with output or production, such as salaries to salesmen or the cost of their office space, they are fixed costs [118] (Goluszka, Tr. 4454; Dr. Greenberg, Tr. 4701). Promotional expenses which do not vary with output or production, such as point-of-sale material, are fixed costs (Goluszka, Tr. 4454).

170. Complaint counsel and respondent introduced into evidence differing computations of Borden's average variable costs of producing cases of ReaLemon quarts distributed in eastern markets supplied from ReaLemon's Minot and Comstock plants during 1971, 1972 and 1973. Complaint counsel's formulation (proposed finding 183, p. 100) is as follows: [119]

Average Variable Cost 12/32 oz. ReaLemon Reconstituted Lemon Juice

	1971		1972		1973	
Variable Costs	Chicago	Minot	Chicago	Minot	Chicago	Comstock
1) Ingredients	1.841	1.936	1.866	1.957	1.897	1.956
2) Container	1.080	1.079	1.116	1.091	1.183	1.104
3) Label	.077	.081	.077	.076	.093	.083
4) A. Labor	.085	-	.078	-	.106	-
B. Packing	-	.177	-	.180	-	.177
5) A. Distribution	.452	.452	.455	.455	.567	.567
B. Direct Ship	.175	.175	.188	.188	.408	.408
6) Selling	.37	.37	.37	.37	.31	.31
7) Advertising	.21	.21	.26	.26	.16	.16
Average Variable Cost:						
A. Distributed	4.12	4.31	4.22	4.39	4.32	4.36
B. Direct Shipment	3.84	4.03	3.96	4.12	4.16	4.20

(Source CX 293)

[120] 171. Complaint counsel's computations, as indicated in the chart, are based on CX 293, which shows a breakdown of the average total cost on a national basis of producing cases of 32-ounce ReaLemon reconstituted lemon juice for the years 1971, 1972 and 1973 at ReaLemon's Chicago plant and for its east coast co-packing operations (Goluszka, Tr. 4445–4452). During the years 1971 to 1973 Borden produced ReaLemon bottled lemon juice at its plant in Chicago, and had a co-packing arrangement with Minot Packing in Bridgeton, New Jersey, for production of ReaLemon in 1971, 1972 and the first part of 1973. During 1973 the co-packing operations were moved to Comstock Foods, a Division of Borden, in Waterloo, New York (Goluszka, Tr. 4446). The ReaLemon product sold in Buffalo and Philadelphia from 1971 through 1973 was produced at Minot or Comstock rather than in Chicago (Goluszka, Tr. 4452). Both parties have used the Minot/Comstock figures in their calculations of Borden's costs.

172. CX 293 was prepared from ReaLemon records for the use of ReaLemon executives by Mr. Ted Goluszka, Financial Manager of ReaLemon Foods. Mr. Goluszka was charged with responsibility for the accounting and data processing functions at ReaLemon, and records were maintained under his supervision which reflect the cost of manufacturing ReaLemon reconstituted lemon juice. These records were used to keep Melvin Peters, President of ReaLemon, informed of current costs of manufacture (Goluszka, Tr. 4443–45). The document was surrendered to complaint counsel pursuant to a request for such documents as would show an "estimate of the average total cost" of manufacturing ReaLemon (Tr. 4711), and purports only to list the "Average Annual Cost of 12/32 Oz. ReaLemon Reconstituted Lemon Juice" (CX 293). Complaint counsel prepared the accompanying chart by taking from CX 293 those items considered by Dr. Warren Greenberg, already mentioned, to be variable costs (Dr. Greenberg, Tr. 4693). [121]

173. Respondent Borden relies on RX 654, another document prepared by Mr. Goluszka (Goluszka, Tr. 4456), for its calculation of average variable cost. This document is also based on CX 293, with certain adjustments made to isolate variable costs from fixed costs (Goluszka 4454). Average variable costs as shown on RX 654 are as follows: [122]

Average Annual Variable Cost
12/32 Oz. ReaLemon brand Reconstituted Lemon Juice

	1971 Minot		1972 Minot		1973 Comstock	
	Buffalo	Philadelphia	Buffalo	Philadelphia	Buffalo	Philadelphia
Average Ingredients	1.936	1.936	1.957	1.957	1.956	1.956
Average Container	1.079	1.079	1.091	1.091	1.104	1.104
Average Label	.081	.081	.076	.076	.083	.083
Average Packing	.177	.177	.180	.180	.177	.177
Total Average Cost of Goods Sold	3.27	3.27	3.30	3.30	3.32	3.32
Distribution	.39	0	.40	0	.17	.25*
Average Selling Exp.	.31	.31	.32	.32	.26	.26
Average Annual Variable Cost	$3.97	3.58	4.02	3.62	$3.75	$3.83*

(RX 654)

*/ RX 654(a), p.2, which shows the underlying calculations on which RX 654 is based, shows the amount of "Distribution" cost in Philadelphia in 1973 to be $.248. Goluszka conceded that according to standard rounding procedures this entry should be .25 rather than .24 as was shown on RX 654. (Goluszka 5679, but see 5683-84). This item has been corrected; accordingly, the final figure for "Average Annual Variable Cost" has been changed to $3.83 rather than $3.82.

[123] 174. Borden's formulation of average variable cost differs from that of complaint counsel in three ways. First, Borden treated advertising as a fixed cost, whereas complaint counsel treated it as a variable cost. Dr. Greenberg testified that although there is some controversy among economists as to this issue, in his opinion advertising is a variable cost. He stated that in many cases, advertising expenditures will vary with a firm's output. At zero output advertising costs are usually zero, while the largest firms in an industry are generally the ones which advertise the most (Dr. Greenberg, Tr. 4712).

175. Citing for support a law review article, Areeda and Turner, "Predatory Practices under Section 2 of the Sherman Act," 88 Harv. L. Rev. 697 (1975), Dr. Greenberg stated that the method by which a company treats advertising on its books is an indication of whether advertising expenditures should be treated as a fixed or variable cost. Borden treats its advertising as an expense, rather than as an investment. Therefore, Dr. Greenberg stated, advertising should be treated as a variable cost in this case (Dr. Greenberg, Tr. 4713–14). Dr. Greenberg also cited economic literature which suggests that advertising is a variable cost, but in contexts other than a discussion of the components of average variable cost (Tr. 4694–97). However, he conceded that economists or accountants do not typically treat advertising as a variable cost (Tr. 4696).

176. Respondent Borden, on the other hand, treated advertising expenditures as a fixed cost (Goluszka, Tr. 4454). Dr. Morton Kamien, a Professor of Managerial Economics and an expert witness for respondent, testified that he considers advertising to be a fixed cost, and that his opinion is an accepted one among economists (Dr. Kamien, Tr. 5767). [124]

177. Borden's ReaLemon advertising expenditures are not in fact related, at least in the short-run, to the level of its output. Mr. Goluszka testified that the level of advertising for ReaLemon was set at the beginning of the year and maintained throughout the year regardless of the number of units produced during that period (Goluszka, Tr. 5662). Yearly expenditures for ReaLemon advertising increased in 1972 although production dropped, and decreased in 1973 while production increased (CX 288, CX 292).

178. In rebuttal to Dr. Greenberg's testimony about the possibility of treating advertising as an investment, John Dillon, a certified public accountant and Price, Waterhouse partner, testified that in his 15 years' experience he is not personally familiar with any company which treats advertising cost as anything other than an expense item, and that in his opinion it is proper only to expense

advertising in the year incurred, and not to defer or capitalize in any way advertising cost (Dillon, Tr. 4864). Dr. Greenberg himself stated that he knows of no company which treats advertising only as an investment (Tr. 4716–17).

179. Based on the foregoing, the undersigned finds that advertising was not a variable cost in the case of ReaLemon, and should not be included in a calculation of ReaLemon's average variable cost for production of its bottled lemon juice.

180. The second difference between Borden's formulation of average variable cost and that of complaint counsel is the following. Borden considered only a portion of the cost of average selling expense found in CX 293 in its calculation of average variable cost (Goluszka, Tr. 4456–58). Complaint counsel, based on Dr. Greenberg's testimony that he understood that the selling expense item [125] was composed solely of commissions paid to salesmen or brokers (Dr. Greenberg, Tr. 4700–4702), included the entire item in their calculation of average variable cost. However, Mr. Goluszka, who prepared CX 293, testified without contradiction that selling expense contains elements other than commissions, such as salesmen' salaries and their administrative costs (Goluszka, Tr. 5672–74). Dr. Greenberg admitted in his testimony that salary and administrative sales costs would constitute fixed costs which properly should be excluded from the average variable cost equation (Tr. 4701–4702). Borden's RX 654 eliminates these elements of fixed expense and contains only the variable expenses of commissions paid to brokers or salesmen (Goluszka, Tr. 5671–74; RX 654(a), p. 3). That figure is the one adopted in these findings.

181. Complaint counsel attack Mr. Goluszka's inclusion only of commissions paid to Borden salesmen in his calculation of 1973 selling expense (RX 654(a), p. 3). Mr. Goluszka testified that he did not know whether ReaLemon employed any brokers in that year (Goluszka, Tr. 5674), and complaint counsel point out that CX 79 shows ten brokers were retained by Borden for sale of ReaLemon reconstituted lemon juice. That exhibit, however, shows that no brokers were retained in Buffalo or Philadelphia, the cities in which below cost sales are alleged to have been made, or anywhere on the East Coast (CX 79). This discrepancy, therefore, does not cast substantial doubt on the accuracy of the selling expense figure contained in RX 654 as it pertains to the issues raised in this case.

182. The final area of disagreement between Borden and complaint counsel concerns the treatment of distribution costs. Complaint counsel used the distribution costs found in CX 293. Average distribution costs in that document were computed by

allocating total distribution and warehousing costs [126] against all ReaLemon product shipped throughout the country, to arrive at a "one weight" basis or standard figure which was then allocated to the 32-ounce equivalent product. Average "Direct Ship" is a subdivision of total distribution costs, which refers to shipments made directly to customers, bypassing the normal distribution system (Goluszka, Tr. 4449–50). For a reason not wholly clear from their findings, complaint counsel used a "direct shipment" cost for Acme and a "distributed" cost for Niagara in calculating the cost of supplying those accounts (compare complaint counsel's findings 186–87 with 183). Dr. Greenberg, on the contrary, indicated that he would use the "average direct ship" figure for sales in both Philadelphia and Buffalo (Tr. 4702–4704).

183. Borden, on the other hand, attempted to determine the actual distribution costs incurred in selling to Acme and Niagara, rather than using the average nationwide cost. Borden asserts in its proposed findings (No. 244) that products sold to Buffalo customers which purchased in large quantities, such as Niagara, were shipped in carload lots directly from the Minot or Comstock plant, while products sold to large customers in Philadelphia, such as Acme, were picked up by the customer while the Bridgeton plant was in operation, and thereafter shipped in carload lots from Comstock. RX 654, therefore, reflects as distribution costs the carrier rates for carload shipments to Buffalo from Comstock or Bridgeton and to Philadelphia from Comstock in 1973. Since, it is claimed, ReaLemon incurred no distribution costs when Philadelphia customers picked up at the Bridgeton plant, no rate is specified for those sales (Goluszka, Tr. 4457–58; RX 654(a), pp. 1, 2).

184. Mr. Goluszka testified that ReaLemon's average variable cost is usually computed from the total costs for all ReaLemon Foods plants nationally, rather than on a city-by-city basis (Goluszka, Tr. 5660–61), and freely conceded that his calculations [127] in RX 654 apply only to those companies taking delivery by the method assumed, and from the common carrier whose rates were used, in making the calculation (Goluszka, Tr. 5674–79). It is also clear from the record that ReaLemon did not consider its actual cost of serving Acme and Niagara at the time the sales in question were made. RX 654 was prepared solely for the purposes of this litigation (Goluszka, Tr. 4454–4460). Dr. Greenberg testified that in determining distribution costs for various customers it would be preferable to have information as precise as possible with regard to actual shipping costs rather than to rely on average shipping costs for all customers (Dr. Greenberg, Tr. 4709–4710). It is determined, therefore, that it is

proper for respondent Borden to attempt to isolate the variable cost of those sales made to particular customers which are alleged to have been below variable cost.

185. The cost estimates for Philadelphia which are contained in RX 654 apply only to a company picking up from the Bridgeton plant in 1971 or 1972, and taking delivery from Comstock in 1973 by the Todds Transport Company (Goluszka, Tr. 5692). The distribution costs for Buffalo found on RX 654 were computed using the full truckload rates of LoBiando Motor Express (Goluszka, Tr. 5678). However, the record does not establish that Acme and Niagara received all their deliveries in the manner assumed for the purpose of RX 654. A comparison of the invoices contained in the record with Borden's price lists (CX 37–54) shows that Acme received all its shipments of ReaLemon quarts recorded in the invoices from Minot at the FOB plant or ex-plant pickup price in 1971, 1972 and the first part of 1973 (see CX 219, pp. 1–216), and received a number of shipments in 1973 from Comstock at the price applicable to carload delivery (see CX 219, pp. 218, 225, 240, 252, 288, 295, 301, 305). Acme also received some shipments in 1973 [128] from Acme's warehouse in Hanover, Pennsylvania (CX 219, pp. 232, 244, 256, 263, 277; Sankey, Tr. 4811), and some deliveries at a charge for less than carload lots (CX 219, pp. 256, 263, 271). Mr. Goluszka testified that transportation costs for less than full truckloads are higher than full truckload rates (Goluszka, Tr. 5682–83), and that the cost of storing a finished product is a variable cost (Goluszka, Tr. 5666). However, neither of these costs is reflected in RX 654 (Goluszka, Tr. 5667, 5692). Thus, respondent Borden's variable cost figures for Acme are slightly understated for 1973.

186. The invoices contained in the record show that, in accordance with the assumptions underlying RX 654, Niagara bought ReaLemon reconstituted lemon juice from Minot in 1971 and 1972 at the list price for carload deliveries (CX 203–210). In 1973, however, one sale was made from Comstock at the delivered price (CX 211, 215). In one other instance Niagara received product from Comstock at the plant pick-up list price (CX 212). The invoices thus support the conclusion that the cost estimates for Niagara contained in RX 654 are generally reliable, and are perhaps slightly overstated for 1973.

187. In the opinion of the undersigned the evidence establishes that Borden did not sell its ReaLemon processed lemon juice at a price below average variable cost in Buffalo. The sale in that city alleged by complaint counsel to have been below average variable cost was one made to Niagara in December 1973 at a net price of $4.05 per case (CX 212; Gerace, Tr. 2011). However, Borden's 1973

average variable cost for that sale, according to RX 654, which has been found to be reasonably accurate, was $3.75, or 20 cents below the price paid by Niagara. Even if Borden's national average cost for direct shipment found in CX 293, 40.8 cents, is substituted for the distribution cost of 25 cents in RX 654, the average variable cost would be $3.99, or 6 cents below the price given to Niagara. [129]

188. The parties are not in agreement as to the lowest net price paid by Acme for ReaLemon quarts in 1973. Complaint counsel contend that Acme made a purchase in December 1973 at a net cost of $3.20 per case and two purchases in May of that year at a net cost of $3.65 per case (complaint counsel's proposed finding No. 186; CX 219, pp. 218–231, 288–293). Sales at these prices would be below even Borden's statement of its costs (RX 654). Acme deducted $2.80 from the invoice list price of $6.45 in the May transactions for a net payment of $3.65 per case, and deducted a total of $3.25 per case, including a $1.00 per case off-invoice promotional allowance, from the invoiced list price of $6.45 per case for a total net payment of $3.20 per case on the December transaction (CX 219, pp. 218–231, 288–293). As has been previously discussed, $1.00 per case of the deductions made by Acme in each of these transactions was claimed to be accrued coop allowances which were deducted in the aggregate, rather than a $1.00 per case price concession granted to Acme on these particular purchases.

189. It is clear from the record, as previously found, assuming the $1.00 deducted per case by Acme was accrued coop money, that such deduction was permitted by Borden although it violated the provisions of the cooperative merchandising program which required payments of coop funds to be made by check, after proof of performance was submitted, with no off-invoice deduction to be allowed (CX 70, 74, 94–100).

190. Accepting the $1.00 per case deducted by Acme in the foregoing transactions as accrued coop money, the lowest price paid by Acme in 1973 was $4.05 per case, or the list price of $6.45 less a $2.25 promotional allowance (see CX 31), less 15 cents per case cooperative advertising allowance. [130]

191. Borden's calculation of its variable cost of sales to Acme in 1973 was $3.83, or 22 cents below the lowest sale price. If one adds to that cost estimate the difference between Borden's national average cost of direct shipment from CX 293 and the distribution cost found in RX 654, the average variable cost is $3.99, or only 6 cents below the sale price to Acme of $4.05.

192. Complaint counsel do not allege any other sales below cost. In summary, in the opinion of the undersigned, the record does not

establish by a preponderance of the evidence that Borden sold ReaLemon processed lemon juice at a price lower than its average variable cost of producing that product.

193. The record does establish, however, that Borden sold lemon juice to Acme markets in Philadelphia and to Niagara Frontier Services (Tops Markets) in Buffalo at an extraordinarily low price. The lowest price which the record shows was given to another Philadelphia supermarket was $4.20, given to Frankford-Quaker (CX 218, pp. 6, 8, 9, 10). In Buffalo, the lowest price reflected in the record which Flickinger received in 1973 was also $4.20 (CX 216, pp. 13–16). The $4.05 per case price is close to ReaLemon's National average per case cost on a direct shipment basis. This cost appears to have been the only data available to Borden management at the time the subject sales were made. As previously stated, ReaLemon's financial manager, Mr. Goluszka, testified that he generally computed the company's average costs using nationwide data from all ReaLemon plants (Goluszka, Tr. 5660–61). Thus, at the time of the sales in question, Borden either failed to consider its cost before agreeing to the low sale prices, or knew that it was selling very close to the cost figures reflected in the data that was then available to it. [131]

194. As has previously been described and found, ReaLemon commands a price premium over other brands of processed lemon juice. Nielsen data for 1973 indicated that ReaLemon sold for 10 to 21 cents more than Golden Crown in the 32-ounce size in Eastern and North Central area markets (CX 4, p. 873). The ReaLemon Foods president stated in ReaLemon's 1972 Marketing Plan, as also described earlier, that in a "completely unique situation" ReaLemon lemon juice commanded a premium of 25 to 30 cents per unit over competitive brands (CX 2, p. 665).

195. ReaLemon received from its brokers and employees competitive information with regard to Golden Crown promotional levels (CX 81), and attempted to analyze Golden Crown's cost structure. In 1972 ReaLemon estimated that Golden Crown's cost of goods alone (including a 20 percent reduction in the cost of ingredients for suspected adulteration)[3] was $2.83 (CX 3, p. 762). Adding the cost of distribution, selling and overhead, ReaLemon's estimate of Golden

[3] In fact, Golden Crown's reconstituted lemon juice was adulterated with citric acid and sugar, and respondent Borden's suspicions in this respect were well founded. The evidence proves beyond question that Golden Crown routinely, at least during significant production periods, manufactured its reconstituted lemon juice using substantial amounts of citric acid and sugar, and the undersigned so finds. See the testimony of Scotellaro, Tr. 3559–3705 and Bello, Tr. 3740–3784, and RX 12, pp. 1 through 56, RX 13, pp. 1 through 19, RX 560, pp. 1–2; see also respondent's proposed findings 7 through 14, pp. 11 through 15, which are accurate on this issue. Scotellaro and Bello were former workers in the Golden Crown plant. Their testimony was thoroughly credible, and was backed up by completely convincing documentary evidence. There was no disclosure, it may be noted, on the Golden Crown lable of the presence of sugar and citric acid.

Crown's cost was $3.74 (CX 3, p. 762). Paul Hansfield, Golden Crown's president, estimated in late 1973 or early 1974 that its costs were $3.11 before freight and selling expenses, and approximately $4.00 including those items (CX 145; Hansfield, Tr. 137–143). ReaLemon's estimate of Golden Crown's costs were thus relatively accurate. [132]

196. Like any other marketer Golden Crown had to provide a satisfactory retailer markup in order to secure distribution, shelf space, display and feature activity. According to ReaLemon's sources, the markup was 20 percent to 30 percent in 1972 and 1973 (CX 3, p. 763; CX 4, p. 855). In the words of former ReaLemon's broker, Alan Wrisley, "[t]here is only one reason why a retailer would want to stock another brand [in addition to ReaLemon] . . . [t]hat would be because he could make more gross margin dollars by stocking it . . ." (Wrisley, Tr. 2181). Golden Crown also expected retailers to make a 20 to 22 percent markup (Hansfield, Tr. 158).

197. As its Marketing Plans and other internal documentation establish, ReaLemon determined to maintain its dominant market share and remain the featured brand of bottled lemon juice at the retail level because it considered this factor to be the best way to restrict the growth of competition (CX 2, p. 679). As has already been recounted, ReaLemon throughout the years 1971 and 1974 used price promotions to reduce the price spread between it and competing brands (CX 1, p. 656; CX 2, pp. 677, 700; CX 3, pp. 788, 792; CX 4, p. 873). For example, in the fall of 1973 ReaLemon initiated promotional allowances of $2.25 per case in the Northeastern United States and Chicago (CX 4, p. 894; CX 31). The ReaLemon representative suggested to Acme markets that with a $2.25 promotional allowance it should feature ReaLemon quarts at a retail price of 39 cents (CX 219, p. 274). As discussed, Acme deducted an additional dollar off invoice, which Borden ratified, for a total of $3.25 off invoice, and did price ReaLemon at a 39-cent retail, a 16-cent reduction from its regular price (CX 93). [133]

198. ReaLemon's former Philadelphia broker observed that to compete with ReaLemon another brand of reconstituted lemon juice needed to be 10 to 15 cents per quart cheaper at retail and "would still have hard sledding" (Vinocur, Tr. 2105–2106). For Golden Crown to maintain even a 10 cent retail price differential, and for the retailer to maintain a 20 percent markup, Golden Crown would have had to have been purchased at $2.90 per case by Acme. That would have been 84 cents under ReaLemon's estimate of Golden Crown's cost and $1.10 under Golden Crown's cost, as stated by Mr. Hansfield.

199. In Buffalo, the continuous $4.40 per case price received by Niagara (Tops Markets) in 1971 and 1972 allowed it to feature ReaLemon at 37 to 39 cents per quart (CX 203–210, CX 215; Gerace, Tr. 2025). For a retailer selling ReaLemon at 39 cents per quart to maintain a Golden Crown price differential of 15 cents, he would have to sell Golden Crown for 24 cents a bottle. If he were going to maintain the margin that made it profitable to purchase a second brand, this would mean (using a 20 percent markup figure) that he would have to be able to purchase Golden Crown at $2.40 per case. If he priced Golden Crown only 10 cents under ReaLemon, at 29 cents, he would have to be able to purchase Golden Crown at $2.90 per case. Even if he priced Golden Crown at only five cents under ReaLemon at 34 cents, probably far less than the differential needed to cause purchasers to abandon the premium ReaLemon brand for a relatively unknown new entrant, he would have to be able to purchase Golden Crown at $3.40. ReaLemon's $4.05 price to Niagara in December of 1973 would have required an even lower Golden Crown cost, assuming the same margin and price differential (CX 212). [134]

200. In sum, respondent Borden priced its ReaLemon lemon juice so low in the foregoing transactions in Philadelphia and Buffalo that competing brands, such as Golden Crown, could not market their brands without selling near, at, or even below cost. The fact that Golden Crown, a new entrant, in attempting to break into the market may have been the first to offer bottled lemon juice at extremely low or below cost prices (see, for example, RX 175 and, for additional instances, Borden's proposed finding 203) did not justify, in the opinion of the undersigned, Borden's pricing practices. It is obvious from the record of this proceeding that Golden Crown, or any other new entrant in the marketing of bottled lemon juice, had only one way of breaking into the market in the face of the consumer acceptance of the ReaLemon brand, and that was price.

201. What cannot be overlooked is that Borden possessed a monopoly share of the bottled lemon juice market, and was the beneficiary of a barrier to entry in the form of the "consumer franchise" conferred by the ReaLemon brand. To permit Borden to price ReaLemon at or near cost as a competitive weapon to combat a new entrant, on the ground that such new entrant, using the only means available to it for breaking into the market, itself priced at or near cost, would allow Borden free reign to maintain its monopoly position and restrict new entry.

5. Borden maintained its monopoly position

202. ReaLemon was successful in maintaining its monopoly position, both nationally and in most metropolitan markets. In 1974, as previously described, ReaLemon's nationwide volume share of the processed lemon juice market was 75.3 percent compared with [135] Golden Crown's 14.9 percent.[4] Two other companies in the market had shares of only 1.4 percent each. ReaLemon's 1974 dollar share was even higher: 77.8 percent compared to 10.6 percent for Golden Crown and 1.9 percent and 2.9 percent for other companies in the industry (CX 239). As has been previously stated, ReaLemon's market share in many metropolitan areas was much higher than its national share, and in many large cities ReaLemon's market share continued in excess of 90 percent (see CX 258). According to complaint counsel's tabulations, in early 1974 ReaLemon had 90 percent or more of the bottled lemon juice business (equivalent case sales) in Seattle/Takoma, San Francisco, Minneapolis/St. Paul, Memphis/Little Rock, Kansas City, Houston, and Cincinnati/Dayton/Columbus, 85 percent or more in St. Louis, Indianapolis, Pittsburgh, New Orleans, and Miami, 80 percent or more in New York, Phoenix/Tucson, Dallas/Ft. Worth, and Birmingham/Montgomery, and 75 percent or more in Atlanta, Baltimore/Washington, Chicago, Cleveland and Syracuse (CX 258). In only one metropolitan area, Los Angeles, out of all the major cities in the United States, according to complaint counsel's tabulation, did the ReaLemon share of the bottled lemon juice business in 1974 fall below 60 percent, and in only two, Denver and Buffalo, did it fall below 70 percent (CX 258). Dollar share figures were even higher (CX 258). According to respondent's own marketing plan for 1974, in Atlanta, Birmingham, Baltimore/Washington, Cincinnati, Cleveland, Houston, Indianapolis, Kansas City, Memphis/Little Rock, Minneapolis/St. Paul, New Orleans, New York City, Pittsburgh, Seattle/Takoma, St. Louis and San Francisco, containing almost 40 million people, ReaLemon had over 75 percent of the reconstituted lemon juice business, and in a substantial number of these Cities ReaLemon's market share ranged upwards of 80 percent (CX 4, p. 883). [136]

203. Although ReaLemon declined from control of 90 percent or more of the processed lemon juice business nationally to around 75 percent in 1975 (according to respondent's own figures, RX 669), the latter, under the circumstances disclosed by this record, remains a monopoly share. And as described in the preceding finding, respondent's control of the processed lemon juice business in the

[4] ReaLemon's "equivalent case" share of the processed lemon juice market was 74.7 percent in 1975, while Golden Crown had a 15.2 percent share (RX 669).

bulk of the nation's urban markets remained at monopoly levels of 70 percent or more, even if there were declines in some cities by September 1975, that is, to 68 percent in Buffalo, to 67.5 percent in Philadelphia (RX 669). In short, respondent succeeded in maintaining its monopoly position in the nation overall, and in most of the nation's metropolitan areas.

204. Furthermore, ReaLemon itself recognized that checking Golden Crown's growth in those areas where it was making a substantial effort to enter the market was likely to significantly impair its ability to expand into new markets (CX 4, p. 864). Thus, even though ReaLemon lost some of its market share in some cities, it can be concluded that its efforts against Golden Crown in those cities contributed to its ability to maintain its historic monopoly position in other areas.

III

Legal and Factual Issues

Relevant Product Market

As stated at the beginning of this decision, a paramount issue in this proceeding concerns proper definition of the relevant product market. Respondent Borden has contended from the start that fresh lemons and processed lemon juice compete for the same end [137] uses among the consuming public, and consequently are in the same relevant market. Complex and extensive economic testimony was presented by Borden on this issue through Doctors Massy and Kamien, particularly the former. See respondent's proposed findings, pp. 34–60, reply memorandum, pp. 9–45.

Based upon data relating to consumer use of fresh lemons and commercial (bottled) lemon juice developed by a menu census conducted by the Market Research Corporation of America, Dr. Massy concluded there was reasonable interchangeability of end uses for both products, that no demographic or socioeconomic factors prevented any significant number of persons from using either fresh lemons or processed lemon juice, and that substitution was taking place among consumers (see respondent's proposed findings, p. 43). In short, there was a "similarity of uses of the products." Dr. Kamien examined the results of Dr. Massy's study and saw no evidence that fresh lemons and processed lemon juice should be in separate submarkets (Dr. Kamien, Tr. 5753–5756). Dr. Massy further calculated elasticity of substitution, cross-elasticity of demand, and the ratio between "own price elasticity and cross-elasticity." He concluded

that there was a significant relationship between the prices of fresh lemons and processed lemon juice, and the sales volume of the products, and a high degree of competition between processed lemon juice and fresh lemons (see respondent's proposed findings, pp. 48–60).

Complaint counsel vigorously dispute Dr. Massy's conclusions. They deny his view that potential interchangeability of use is adequate to define a relevant market, and deny that the prices of fresh lemons and processed lemon juice are interrelated. On the contrary, complaint counsel assert that fresh [138] lemons and bottled lemon juice are priced independently of each other. Complaint counsel attack Dr. Massy's interpretation of the menu census data of the Market Research Corporation of America as arbitrary, and attack Dr. Massy's conclusions from his elasticity of substitution and cross-elasticity of demand studies. Complaint counsel contend, among other things, that there are substantial data problems in the material underlying Dr. Massy's work "which make the results of Dr. Massy's regressions [econometric equations] unreliable."

More particularly, complaint counsel question Dr. Massy's elasticity of substitution model, which respondent asserts demonstrates a relationship between the relative prices of fresh lemons and processed lemon juice and the relative sales volumes of the products. Complaint counsel question this study of Dr. Massy on the ground that in order to compute a cross-price elasticity from an elasticity of substitution, the "own-price elasticity" of the product must be known (Dr. Massy, Tr. 5204). Inasmuch as Dr. Massy did not know the own-price elasticity of either fresh lemons or bottled lemon juice, he was compelled to use a "surrogate," and used the own-price elasticity of sugar. Complaint counsel characterize this as "pure speculation," pointing out that greatly different results would have been obtained in Dr. Massy's regressions had he used oranges or shortening. Depending on the surrogate used, the results of Dr. Massy's calculations would have variously shown fresh lemons and bottled lemon juice to have been complements, weak substitutes, or independent and unrelated to each other.

Dr. Kaplan, an expert economist, pointed out the deficiencies in Dr. Massy's methodology for attempting to define the relevant product market by means of an elasticity of substitution measure, particularly without knowing "own-price elasticity" (Tr. 6026–28): [139]

Q. Dr. Kaplan, on the basis of the four exhibits that you have described and the methodology employed by Dr. Massy, what is your professional opinion of the use of the elasticity of substitution in defining the relevant market in this case?

A. Well, initially, elasticity of substitution has a problem because you need to know your own price elasticity, but even ignoring that problem, it seems that we have gotten an array of possible elasticity of substitution going from minus .92 all the way to a positive .4190 using a variety of plausible model specifications, plausible data definitions in cases of a time trend which seem plausible as well and, therefore, we have got just a morass of different numbers and, therefore, it seems difficult to be able to single out any particular one of these with any confidence and point to that one and say this is what, indeed, the elasticity of substitution is.

In fact, these numbers, assuming that the own-price elasticity is consistent with these goods, one [sic] complements independent or weak substitutes. I don't think particularly, they are consistent with their being strong substitutes, however.

This is not to suggest that I think that it is plausible, that they are complements, but the fact of the matter is that in defining statistical procedures and in analyzing these things, [140] you must be able to differentiate between various relationships, and this particular methodology and the procedures employed, just don't allow you to do that.

Q. What is your professional opinion, Dr. Kaplan, of using elasticity of substitution in defining a relevant market?

A. Again, as I have indicated time and time again, that without own-price elasticity of the product involved, its usefulness is very limited.

Q. Suppose, for a moment, Dr. Kaplan, that two consumer goods had an estimate of elasticity of substitution of negative .9. Could you conclude that these two goods are complements and have no relationship at all or weak substitutes?

A. Yes, you could conclude any of those.

Q. What is the reason that this number is consistent with all these possible results?

A. Again, depending on what the own-price elasticity is, all those results are possible.

Q. Could you give an example why this is true?

A. I think I indicated earlier, if you have the price and quantity of one variable remaining constant through the period though there are price changes with respect to the other item and there is, since it has own-price elasticity, there are quantity changes, you would estimate in that case [141] an elasticity of substitution and if, for instance, own-price elasticity was minus .9, which is not an excessively large number and perfectly plausible, you would come up with an elasticity substitution of minus .9 and clearly, there is no interdependence between the price of one good and the quantity of demand of another.

Serious uncertainties thus underlie Dr. Massy's calculations purporting to show a relationship between the prices of fresh lemons and processed lemon juice and the sales volume of the products.

In contrast, the record in this proceeding establishes substantial retail price differences to exist, and to have existed over the years, between fresh lemons, that is, the juice in them on a per ounce basis, and bottled lemon juice (see findings 25 through 29). The record also

establishes that bottled lemon juice was priced independently of fresh lemons, and fresh lemons were priced independently of bottled lemon juice. Neither fluctuated in response to price changes of the other at the wholesale or retail level.

The undersigned thus cannot accept Dr. Massy's testimony and calculations if he is suggesting the existence of price sensitivity between fresh lemons and bottled lemon juice. Such does not exist, as the record discloses. Of course, at some point price differentials, if large enough, may cause some segments of the public to shift from virtually any product to a substitute, if there is a substitute. Cf. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 574 (1966). The record here does not establish that consumers in day-to-day supermarket purchases switched between fresh lemons and bottled lemon juice [142] in response to changes in the prices of the two products. On the contrary, as stated in the findings, the two continued side-by-side in the market-place notwithstanding the fact that, as a ReaLemon advertising brochure to the trade publicized, one could obtain for 2.8¢ the same amount of ReaLemon lemon juice as one would have had to pay 12.3¢ for in the form of a fresh lemon, about one-fourth as much.

Turning to the question of standards for market definition, the principles applicable to determination of "line of commerce" under Section 7 of the Clayton Act are clearly applicable to determination of relevant product market under monopoly charges. *United States* v. *Grinnell Corp., supra,* 384 U.S. at 573; *L. G. Balfour Co.,* 74 F.T.C. 345, 497 (1968), *aff'd in part, rev'd in part, L. G. Balfour Co.* v. *Federal Trade Commission,* 442 F.2d 1, 9–11 (7th Cir. 1971); *United Fruit Co.,* 82 F.T.C. 53, 149 (1973), *rev'd in part and aff'd in part, Harbor Banana Distributors, Inc.* v. *Federal Trade Commission,* 499 F.2d 395 (5th Cir. 1974). See also *Columbia Broadcasting System, Inc.* v. *Federal Trade Commission,* 414 F.2d 974, 978–79 (7th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970).

As already stated, the undersigned has no doubt that processed lemon juice constitutes, at the least, a valid submarket for antitrust purposes. The fact is that fresh lemons and processed lemon juice are very different products, as the findings herein disclose. Bottled reconstituted lemon juice simply does not taste as good as juice from fresh lemons. Indeed, the difference between the taste of the two products seemingly is severe (findings 18 and 19). Bottled lemon juice contains additives which are objectionable to much of the public (finding 24). The study done by the Center For Advanced Marketing Practice reported comments of persons interviewed on [143] this score (CX 286, pp. 7673–74). One illustrates the point: "Most bottled

things have chemicals added to it [sic] and you pick that up, the chemical taste." See also the comments of ReaLemon Foods' president in the 1972 Marketing Plan (CX 2, p. 674). There are many other economically important differences (findings 10 through 17, and 20 through 23). Not to be ignored, furthermore, is the fact that there are important uses for which processed lemon juice cannot be substituted for fresh lemons, for example, as a garnish in serving food, a lemon wedge in a glass of iced tea, lemon peel in a beverage.

Even if there is a degree of interchangeability, however, and some substitution actually takes place as Dr. Massy maintains, there is a serious loss of utility, for example, accepting poor taste and additives if bottled lemon juice is used instead of fresh lemons, and a great loss of convenience, risk of spoilage and much higher cost if fresh lemons are purchased instead. Ignoring these factors, and recognizing that fresh lemons and processed lemon juice are used for many of the same purposes by the public, does not dictate that they must be placed in the same product market where serious, important and economically substantial distinguishing characteristics differentiate the products, as in this case. The same consideration applies to the many examples of lemon flavored and lemon based products introduced in evidence by respondent (RX 382). See *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 275 (1964) (insulated aluminum conductor considered a separate market although competition with copper conductor would also have permitted grouping into a single product market); *Union Carbide Corp.,* 59 F.T.C. 614, 655 (1961) (competition between polyethylene film and other flexible packaging materials, yet former held to constitute separate lines of commerce); *United States* v. *Lever Bros. Co.,* 216 F. Supp. 887, 891 (S.D.N.Y. 1963) (direct competition between low sudsing [144] detergents and high sudsing detergents, yet placed in separate lines of commerce); *United States* v. *Aluminum Co. of America,* 233 F. Supp. 718 (E.D. Mo. 1964), *aff'd per curiam,* 382 U.S. 12 (1965) (separate market for aluminum curtain wall, notwithstanding competition with other types of building materials for same use).

The most comprehensive statement of the criteria for market definition is contained in *Brown Shoe* v. *United States,* 370 U.S. 294, 325 (1962). It was there established that although the outer boundaries of a product market may be determined by reasonable interchangeability of use or cross-elasticity of demand between a product and substitutes for it, well-defined submarkets may exist within the broad market which in themselves constitute product markets for antitrust purposes. Among the factors enumerated by *Brown Shoe* are (370 U.S. at 325):

. . . industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

A consideration of these factors compels the conclusion that processed lemon juice constitutes a separate submarket.

Processed lemon juice producers recognized the production, marketing and sale of that product as a separate business (findings 36 through 64). See also *L. G. Balfour, supra,* 74 F.T.C. at 497; *Reynolds Metals Co.* v. *Federal Trade Commission,* 309 F.2d 223, 227 (D.C. Cir. 1962); *General Foods Corp.,* 69 F.T.C. 380, 412 (1966), *aff'd,* 386 F.2d 936, 941 (3rd Cir. 1967), *cert. denied,* 391 U.S. 919 (1968); *Columbia Broadcasting System, Inc.,* 72 F.T.C. 27, 325 (1967), [145] *aff'd in part, rev'd in part and remanded, Columbia Broadcasting System, Inc.* v. *Federal Trade Commission, supra,* 414 F.2d at 978–79.

The prices of fresh lemons and processed lemon juice were completely distinct, as already stated, and fresh lemons cost around four and one-half times as much per ounce of juice as bottled lemon juice (see *e.g.,* RX 546, p. 6, and findings 25 through 27). Comparable differentials have prevailed over the years, and as noted earlier, the differential between juice from fresh lemons and non-premium brands of bottled lemon juice was even greater since such brands had to have a lower retail price to compete with the dominant ReaLemon brand (see finding 82). Although the price differences between ReaLemon lemon juice and competing brands reflected artificial differentiation due to brand acceptance, length of time in the market, etc. (see CX 2, p. 673, where ReaLemon Foods' president states "Processed lemon juice is processed lemon juice"), the price differences between bottled lemon juice and fresh lemons reflected genuine and actual product differences. As stated, fresh lemons have not been driven from the market notwithstanding their greatly higher cost, but continue to have a sales volume many times greater than processed lemon juice. The distinct and substantial price differences prevailing between fresh lemons per ounce of juice and bottled lemon juice, as stated earlier, are strong evidence that they inhabit separate markets. See, in addition to *Brown Shoe, United States* v. *Aluminum Co. of America, supra,* 377 U.S. at 276; *Reynolds Metals* v. *Federal Trade Commission, supra,* 309 F.2d at 229; *Avnet, Inc.,* 82 F.T.C. 391, 450–51 (1973), *aff'd, Avnet, Inc.* v. *Federal Trade Commission,* 511 F.2d 70, 77 (7th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3202 (October 6, 1975); *Litton Industries, Inc.,* 82 F.T.C. 793, 997 (1973). [146]

In the day-to-day retail grocery trade, as also stated earlier, the record discloses little or no sensitivity between the prices of fresh

lemons and the prices of the various sized bottles or plastic containers of processed lemon juice. Fresh lemon prices fluctuate on a weekly and even a daily basis whereas the price of processed lemon juice changes at infrequent intervals (finding 28). Processed lemon juice marketers priced their product to compete with other processed lemon juice brands, not fresh lemons (findings 30 through 33). Retail food store buyers purchased processed lemon juice without considering the price of fresh lemons, and produce buyers stocked fresh lemons without consulting the price of processed lemon juice (findings 34 and 35). There is no evidence that when the price of fresh lemons rose or fell in the produce departments of retail food stores the prices of processed lemon juice were remarked or changed to be competitive, or that the public switched back and forth as prices of fresh lemons fluctuated. The retail price of respondent's ReaLemon lemon juice was determined primarily by the promotional allowances per case prevalent or offered by respondent from time to time (see CX 1, pp. 650, 656–57; CX 2, p. 716; CX 3, p. 781; CX 4, p. 873).

In fact, respondent offered higher promotional allowances in "highly competitive" markets than it did in "low competitive" markets, completely inconsistent with day-to-day, direct price sensitivity with fresh lemons (findings 30 through 32). The lack of sensitivity between fresh lemon prices and processed lemon juice prices is a most significant factor indicating the existence of those products in separate product markets or submarkets. See in addition to *Brown Shoe, General Foods Corp.* v. *Federal Trade Commission, supra,* 386 F.2d at 942. [147]

Processed bottled lemon juice has a variety of distinct and unique characteristics which strongly differentiate it from fresh lemons, and by the same token obviously fresh lemons have unique characteristics differentiating them from bottled lemon juice (findings 10 through 24). Convenience, economy, presence of additives, shelf-life and spoilage are economically highly significant, as emphasized already, and distinguish processed lemon juice from fresh lemons for purposes of market definition. See in addition to *Brown Shoe, United States* v. *E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 593, (1957); *General Foods Corp., supra,* 69 F.T.C. at 414–15, *aff'd, General Foods Corp.* v. *Federal Trade Commission, supra,* 386 F.2d at 941–42; *Union Carbide Corp., supra,* 59 F.T.C. at 655; *United States* v. *Aluminum Co. of America, supra,* 233 F. Supp. at 725. It is clear from the record that one or more of these characteristics was sufficient to cause segments of the public to purchase processed lemon juice, and others to buy only fresh lemons. For members of the public who want the taste of

fresh lemons or the appearance of a lemon wedge or peel, or who refuse to ingest chemical additives, there is no reasonable interchangeability in use or cross-elasticity of demand. Likewise, for segments of the public who demand convenience or economy, or immediate availability without the trouble and mess of squeezing lemons, or who refuse to accept spoilage in the refrigerator, there was no reasonable interchangeability of cross-elasticity of demand.

Further indications that fresh lemons and processed lemon juice are properly components of separate markets or submarkets is the fact that each is marketed through specialized vendors, and each is produced in distinct and unique facilities. Fresh lemons are marketed as fresh produce, whereas processed bottled lemon juice is sold as a grocery product through brokers or, since 1973 in the case of respondent's ReaLemon, by the Borden sales organization (findings 65 and 66). Worth noting, furthermore, is [148] the fact that fresh lemons are purchased by the produce buyers of supermarkets and sold in the produce departments along with oranges, grapefruit, fresh vegetables, lettuce, etc. Bottled lemon juice, except for the small lemon-shaped and colored squeeze bottle, is purchased by grocery buyers and sold in the supermarket grocery departments (finding 67).

Fresh lemons and processed lemon juice, of course, have wholly different production facilities (finding 68). There is obviously no ability on the part of a processed lemon juice plant to produce fresh lemons, or fresh lemon producers to produce processed lemon juice without constructing a plant. In other words, there was no elasticity of production facilities. *Brown Shoe, supra,* 370 U.S. at 325, n. 42; *Liggett & Myers,* Docket No. 8938, final order of April 29, 1976.

The significance of any one of the foregoing factors may be debated, but combined they certainly establish, in the opinion of the undersigned, distinct markets for fresh lemons and processed lemon juice rather than the converse. *United Fruit Co., supra,* 82 F.T.C. at 148, *aff'd, Harbor Banana Distributors, Inc.* v. *Federal Trade Commission, supra* (specialized vendors); *United States* v. *Aluminum Co. of America, supra,* 233 F. Supp. at 725 (specialized vendors); *Budd Company,* CCH *Trade Reg. Rep.,* ¶20998 (F.T.C. 1975) (distinct production facilities); *General Foods, supra,* 69 F.T.C. at 417, *aff'd, General Foods Corp.* v. *Federal Trade Commission, supra,* 386 F.2d at 943 (distinct production facilities). There has been no mechanical counting of the indicia enumerated in *Brown Shoe.* The distinguishing characteristics between fresh lemons and processed lemon juice are of substantial economic significance, and dictate beyond question, in the opinion of the undersigned, the placing of processed

lemon juice in a separate market or submarket from fresh lemons. [149]

Comment is warranted upon the so-called *Cellophane* case, *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), and the glass/metal container case, *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964), upon which respondent places considerable reliance in arguing for the inclusion of fresh lemons and processed lemon juice in the same market. The qualifications added to the market delineation principles of the *Cellophane* case by the subsequent *Brown Shoe* decision were set out by now Chief Justice Burger in his decision in *Reynolds Metals, supra,* 309 F.2d at 226:

> . . .in the [Brown Shoe case], the concepts of interchangeability of use and cross-elasticity of demand underwent certain important qualifications and development. It is now clear that mere potential interchangeability or cross-elasticity may be insufficient to mark the legally pertinent limits of a "relevant line of commerce." The "outer limits" of a general market may be thus determined, but sharply distinct submarkets can exist within these outer limits which may henceforth be the focal point of administrative and judicial inquiry under Section 7.

Similarly, the Supreme Court found a broad market in assessing the merger of two major companies, Continental Can Co., the nation's second largest producer of metal containers and Hazel-Atlas Glass Company, the third largest producer of glass containers, but this did not imply that separate submarkets did not also exist. In *General Foods, supra,* the Commission recognized this fact (69 F.T.C. at 411): [150]

> In *Continental Can,* the Court was confronted with just the reverse of the situation in *Alcoa.* In *Continental Can,* the acquiring company, Continental, produced metal containers and the acquired company produced glass containers. Thus, the issue before the Court was whether a broader market encompassing both products was meaningful; the Court was not concerned with the question as to whether a more limited product market also existed. The Court held that metal and glass containers were in the same product market for the purposes of considering the effects of the acquisition, *even though the Court considered the products of the two companies to be in "separate industries" and to comprise distinct "product markets."* The market defined by the Court in *Continental Can* was that delimited by the "outer boundaries" referred to in the *Brown Shoe* opinion; but *the Court took pains to point out that its finding with respect to this broader market did not preclude the finding of narrower submarkets within the more comprehensive* market. . . . (Emphasis added.)

See also *Liggett & Myers, supra,* where the finding of a broad market did not imply that valid submarkets within a broad dog food market did not exist. As noted at the beginning of this section, the principles of *Brown Shoe* are not limited to Section 7, but apply fully to monopoly charges whether under Section 2 of the Sherman Act or Section 5 of the Federal Trade Commission Act.

Monopoly Power

As the findings establish, respondent Borden possessed monopoly power in the processed lemon juice industry, having the power to control prices and to [151] exclude competition. The acceptance of the ReaLemon brand in the marketplace was such that it was virtually synonymous with bottled lemon juice itself, and commanded a premium price. Competing brands could only maintain sales through a substantial differential between their retail price and the price of ReaLemon. By lowering the price of ReaLemon respondent had the power to force down the price of competing brands and ultimately to force them off the shelves of the nation's supermarkets and retail food stores (findings 81 through 87, and 95 through 100).

Monopoly power has long been defined as the power to control prices or unreasonably restrict competition. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 811 (1946); *United States* v. *E. I. du Pont & Co., supra,* 351 U.S. at 391; *United States* v. *Griffith,* 334 U.S. 100, 107 (1948). ReaLemon Foods at all relevant times shown by this record had between 90 percent and 75 percent of the national market for processed lemon juice, and comparable market shares in a large number of major metropolitan areas (findings 75 through 78).

The existence of monopoly power may be inferred from a predominant share of the market. *United States* v. *Grinnell, supra,* 384 U.S. at 571. Whatever may be the threshold market share permitting an inference of monopoly power, see Judge Hand's dictum in *United States* v. *Aluminum Co. of America (Alcoa),* 148 F.2d 416, 424 (2nd Cir. 1945), in the opinion of the undersigned, respondent far exceeded it in this case.

It is unnecessary, however, to ground the finding that respondent possessed monopoly power in the processed lemon juice industry solely upon ReaLemon's predominant market share, although in the opinion of the undersigned the facts would justify that result. [152] *United States* v. *Grinnell, supra,* 384 U.S. at 571; *Cliff Food Stores Inc.* v. *Kroger, Inc.,* 417 F.2d 203, 207 n. 2 (5th Cir. 1969). The following additional factors, *inter alia,* are strongly demonstrative of monopoly power when combined with ReaLemon's preponderant market share: (1) ReaLemon's enormous size and resource advantages over most competing processed lemon juice brands, including advantages such as nationwide marketing and the consequent ability to advertise nationally through national media; (2) the overwhelming dominance of the ReaLemon brand, and its acceptance over the years by the trade and the public as the premium brand; (3) the concomitant relative impotence and small market share of compet-

ing brands except possibly Golden Crown recently in some metropolitan areas; (4) the premium price commanded by the ReaLemon brand; (5) the competitive necessity for other lemon juice brands to sell at substantially lower retail prices on peril of losing shelf space and being forced from the market; (6) the exceptionally high profitability of ReaLemon lemon juice over the years amounting to three to four times the rate of return on assets realized by other firms in the "Food and Kindred Products" industry group.

The great market share controlled by ReaLemon historically, and at the conclusion of this record, viewed in conjunction with the foregoing factors, renders the existence of monopoly power of ReaLemon Foods in the processed lemon juice market beyond doubt. Instructive in this context is the Commission's comment in *Golden Grain Macaroni Co.*, 78 F.T.C. 63, 162, n. 7 (1971), *order enforced in part*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973):

> A firm with roughly 50% of the market might possess monopoly power if the remaining firms, for some reason, were competitively impotent vis-a-vis the major firm. Such might be the case [153] if the major firm possessed capital assets far in excess of those of its competitors, in a market where assets were essential to competitive vitality; or if the dominant firm marketed a product with a strong consumer preference over its rivals, or if the remaining portion of the market was divided in small fragments, so that no one firm represented a meaningful countervailing force to the pricing activities of the dominant firm. However, none of these circumstances, nor any similar one, was shown to exist in the relevant market here.

All of the factors enumerated in the foregoing are present in this case.

The recent decline in market share of ReaLemon from a historic 90 percent to the present 75 percent does not establish that monopoly power does not exist in respondent Borden in the processed lemon juice industry. As the undersigned has found, the size of respondent's current market share, combined with the factors set out, among others, continues to confer on respondent control over prices and competition in the processed lemon juice industry. In the vast majority of metropolitan markets respondent Borden maintains dominant market shares from 75 to 90 percent, as well as 75 percent nationally.

Unlawful Maintenance of Monopoly Power

The most recent definition of the elements of monopolization by the Supreme Court is found in *United States* v. *Grinnell, supra.* The Supreme Court there held that the components of the offense of monopolization are two-fold (384 U.S. at 570–71): [154]

(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

The Commission followed this standard in *Golden Grain Macaroni Co., supra,* 78 F.T.C. at 157.

It has been found that Borden possesses monopoly power in the relevant market. The legality of Borden's acquisition of monopoly power is not here an issue. Thus, under the foregoing standard, the question in this proceeding is whether Borden willfully maintained that power.

The basic principles governing the law of monopolization were well established before *Grinnell.* Specific intent to obtain or to maintain a monopoly is not a necessary element of the offense. Rather, "[i]t is sufficient that . . . a monopoly results as the consequence of a defendant's conduct or business arrangements." *United States* v. *Griffith, supra,* 334 U.S. at 105. Monopolization is established by the possession of monopoly power "coupled with the purpose or intent to exercise that power." *Griffith,* at 107, citing *American Tobacco Co.* v. *United States, supra,* 328 U.S. at 809, 811, 814. To the same effect: *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110 (1948); *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131 (1948).

The Supreme Court in *Griffith* and its companion cases, *Schine Chain Theatres* and *Paramount Pictures,* built upon Judge Learned Hand's landmark opinion in *Alcoa, supra.* The Court found that Alcoa monopolized the aluminum ingot market in that it "meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started." 148 F.2d at 432. In language specifically endorsed by the [155] Supreme Court in *American Tobacco Co., supra,* 328 U.S. at 814, the Second Circuit dispensed with Alcoa's contention that it was not chargeable with active perpetuation of its monopoly position (148 F.2d at 431):

It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret "exclusion" as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

See also *L. G. Balfour Co., supra,* 74 F.T.C. at 498–99.

The facts disclosed in the record of this case show clearly that Borden took deliberate actions to maintain its monopoly position in the processed lemon juice market, and did maintain a monopoly position despite some reduction in market share. Borden thereby "monopolized" as that term is understood in *Grinnell* and in the earlier cases just discussed. As did Alcoa, Borden "meant to keep, and did keep" a monopoly market share. The ReaLemon marketing plans and other evidence heretofore discussed leave no question that Borden saw its predominant position threatened by emerging competition from other processed lemon juice producers, [156] particularly Golden Crown, and set out specifically to preserve its monopoly power, *viz.*, its historic 90 percent market share.

As the record also shows, Borden engaged in a number of acts and practices, heretofore described, with the purpose of maintaining its monopoly position, and which had the effect of hindering, restraining or preventing competition in the processed lemon juice market. These acts and practices included geographically discriminatory prices, promotional allowances tailored to combat competition in particular areas where competition had arisen, granting to selected key retail stores special allowances designed to eliminate, hinder or restrict sales of competitive processed lemon juices, and taking steps selectively to reduce the retail price of its premium priced product to a level so low as to make it virtually impossible for other producers of processed lemon juice to sell their products at prices above their own cost. The record shows, as stated, that through these methods Borden succeeded in maintaining a monopoly position. Thus, Borden engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

Respondent denies that it engaged in conduct sufficient to constitute monopolization. Relying largely on *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 925–26 (10th Cir. 1975), *cert. dismissed* 96 S. Ct. 8 (1975), Borden asserts that two factors must be present before maintenance of monopoly power in violation of Section 2 can be found (respondent's reply memorandum at 59): "[f]irst, the behavior must be the product of monopoly power, *i.e.*, constitute a use of monopoly power and second, must be exclusionary as distinct from legitimate business behavior." [157]

The Court's discussion of monopolization as a whole in *Telex* reveals that its conclusion that IBM had not violated Section 2 was based on what it termed the "unusual market circumstances" present in that case. The court's basic conclusion was a limited one (510 F.2d at 927):

> There must be some room to move for a defendant who sees his market share acquired

by research and technical innovations being eroded by those who market copies of its products. It would seem that technical attainments were not intended to be inhibited or penalized by a construction of Section 2 of the Sherman Act to prohibit the adoption of legal and ordinary marketing methods already used by others in the market, or to prohibit price changes which are within the "reasonable" range, up or down. Under the unusual market circumstances before us, to so interpret the Act to prohibit such actions is to protect the others in the market from ordinary competition, and was an incorrect interpretation of applicable law.

Borden's attempt to bring itself within the protection afforded by this pronouncement is unavailing. Unlike IBM, Borden was not faced with erosion of a market share "acquired by research and technical innovation" by firms marketing copies of its products developed through misappropriation of its trade secrets and infringement of its copyrights. Rather, Borden was faced with market entry and price competition from [158] other sellers of its technologically simple product, differentiated from other brands of processed lemon juice only by the unique consumer acceptance of its brand name. Second, as has previously been found, Borden's marketing methods can hardly be characterized as "legal and ordinary," and some of its prices have been found to be unreasonable.

Borden relies on *Griffith, supra,* 334 U.S. at 107, for the proposition that "a prerequisite of illegality under Section 2 is the *use* of monopoly power." Respondent's reply memorandum at 57. This interpretation, in the view of the law judge, is a misreading of *Griffith.* While in that case the Supreme Court did find a use by the defendants of their monopoly power in some cities to gain competitive advantage in cities where they did not enjoy a monopoly position, which conduct the Court found to violate Section 2, it is evident that this conduct was considered merely a particularly clear form of monopolization. The statement on which Borden relies, when placed in context, reads as follows (334 U.S. at 107):

So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under §2 even though it remains unexercised. For §2 of the Act is aimed, *inter alia,* at the acquisition or retention of effective market control. See *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 428, 429. Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of §2, provided it is coupled with the purpose or intent [159] to exercise that power. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809, 811, 814. It is indeed "unreasonable, *per se,* to foreclose competitors from any substantial market." *International Salt Co.* v. *United States,* 332 U.S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States* v. *Aluminum Co. of America, supra.* It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

Borden's conduct as shown in this record is not simply "ordinary

business behavior," unrelated to its monopoly position (respondent's reply memorandum at 57–58). On the contrary, the course of conduct shown here was intentionally devised and carried out for the purpose of maintaining its dominant market position in the sale of processed lemon juice. Moreover, it was because of Borden's dominant market position nationwide, and the power over price conferred on it by the premium commanded by the ReaLemon brand, that the acts shown by this record were effective in maintaining a monopoly position. Nor were the acts and practices reflected in the record "nothing more than legitimate business activities designed to allow ReaLemon to compete, not to exclude competition." As stated, ReaLemon's conduct was intended to, and did, maintain a monopoly position. By doing so, Borden plainly hindered and restricted and, in fact, excluded competition.[5] Thus, for example, [160] the 1974 Marketing Plan, quoted earlier, set out the ReaLemon objective of reducing Golden Crown's market share by 20 percent in 4 key metropolitan areas, and stated that reducing Golden Crown's effectiveness in these 4 markets may result "in a significant reduction of expansion leverage" (CX 4, p. 864). This is the core of monopolization.

It is well established that a finding of monopolization does not require that "predatory" or independently unlawful means be used. *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 390 U.S. 481, 497–99, (1968). In *Alcoa* Judge Hand assumed that the defendant was guilty of no "moral derelictions," but found that the company had sought to maintain control of the market, and had maintained control. That was sufficient to establish a violation. 148 F.2d 431. See also *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 344–45 (D. Mass., 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *L. G. Balfour Co., supra*, 74 F.T.C. at 498–99; *L. G. Balfour* v. *Federal Trade Commission, supra*, 442 F.2d at 14.

As has previously been discussed, Borden's actions cannot be justified by Golden Crown's sales at or below cost. Given the market conditions shown by this record, primarily the limited grocery store shelf space available to processed lemon juice, the consumer acceptance of the ReaLemon trade name and the price premium it commanded, the only competitive tool available to a new entrant like Golden Crown in its efforts to break into the market was to offer [161] its product at a very low price. Allowing Borden to respond to

[5] It is not necessary, however, that competitors actually be excluded from the market to establish a violation of Section 2. *American Tobacco Co., supra*, 328 U.S. at 809, 811:

> "[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Monopoly power, whether lawfully or unlawfully acquired, may violate Section 2 even if it remains unexercised provided it is coupled with an intent to use it, *Griffith, supra*, 334 U.S. at 107, as just quoted.

this type of competition by all of the actions reviewed herein would give it free rein to preserve its monopoly position. In this case, in the judgment of the undersigned, Borden overstepped the bounds of permissible response to a new entrant of limited resources by one possessing monopoly power.

What Borden fails to acknowledge is that the law imposes on one in possession of monopoly power limitations on conduct not applicable to one lacking such power.[6] A monopolist may not react to each new entry into its market with an unrestrained attempt to protect its market position, for to do so preserves the "effective market control" condemned by the law. *United States* v. *Griffith, supra,* 334 U.S. at 107. Borden's actions taken to preserve its market control, as shown by this record, violated Section 5 of the Federal Trade Commission Act.

IV

CONCLUSIONS

1. Respondent Borden, Inc. has been engaged at all times relevant hereto in the production, marketing and sale of processed lemon juice in interstate commerce as defined in the Federal Trade Commission Act, and the acts and practices utilized by respondent Borden in connection therewith have been in such interstate commerce. [162]

2. The production, marketing and sale of processed lemon juice, and the United States as a whole, constitute valid and lawful product and area markets within which to determine the charges against respondent Borden, Inc., set out in the complaint.

3. Respondent Borden, Inc. possesses, and has possessed, a monopoly position and monopoly power in the processed lemon juice market, and has unlawfully engaged in acts and practices with the purpose and intent, and with the effect, of preserving and maintaining that monopoly position and power, and has unlawfully hindered, restrained and prevented competition in the production, marketing and sale of processed lemon juice in violation of Section 5 of the Federal Trade Commission Act.

4. This proceeding and the order set out herein are in the public interest.

[6] For this reason, in the opinion of the undersigned, *International Air Industries* v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3493 (1976), *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955) and *Golden Grain Macaroni Co., supra*, cited by Borden in support of its contention that its pricing policies were lawful, are simply not pertinent to the issues present in this case.

V

REMEDY

It has been found that respondent Borden possessed a monopoly position and power in the processed lemon juice industry, that it engaged in business conduct with the purpose and intent, and with the effect, of preserving and maintaining that monopoly position and power. It has been found that respondent Borden succeeded in maintaining its monopoly position and power nationally, and in the great majority of the country's major metropolitan markets. Under the circumstances, the question becomes one of proper relief. In a "monopolization" case, adequate relief must put an end to the monopoly position, and break up or render impotent the monopoly power found to have been preserved and maintained in [163] violation of law. *United States* v. *Grinnell, supra,* 334 U.S. at 577; *United States* v. *Paramount Pictures, supra,* at 171. In *Schine Theatres* v. *United States, supra,* at 128, the Court stated:

> In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees.

See, likewise, *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 188-89 (1944). Doubts respecting relief are to be resolved in favor of the government. *United States* v. *Bausch & Lomb Optical Company,* 321 U.S. 707, 726 (1944). The Commission has wide discretion in determining the type of order necessary to bring an end to the violation found to exist, so long as the remedy has a reasonable relation to such violation. *Federal Trade Commission* v. *National Lead Company,* 352 U.S. 419 (1957).

Enjoining the acts and practices by which respondent knowingly preserved and maintained its monopoly position, and prohibition of a repetition [164] thereof, will not constitute an adequate remedy in this proceeding and end the monopoly power possessed by ReaLemon Foods in the processed lemon juice industry. The heart of the monopoly power preserved and maintained by respondent Borden lies in the ReaLemon trademark and its dominant market position. For competition to enter the processed lemon juice industry, the barrier to entry which inheres in the ReaLemon trademark must be eliminated. As a consequence, in the judgement of the undersigned,

the only effective relief under the facts shown by the record in this case requires the licensing of the ReaLemon brand name to others wishing to enter the production, marketing and sale of processed reconstituted lemon juice.

Such a course is not unprecedented. In *American Cyanamid Co.*, 63 F.T.C. 1747 (1963), the Commission, after a finding of suppression and exclusion of competition through the use of a patent obtained by deliberate misrepresentations of material facts, directed compulsory licensing to open the tetracycline industry to competition. A two and one-half percent royalty of net sales under such licenses was granted. 63 F.T.C. at 1910. The Commission's compulsory licensing order was approved by the Court of Appeals although the decision was vacated and remanded because of the disqualifications of a Commissioner. *American Cyanamid Co.* v. *Federal Trade Commission,* 363 F.2d 757, 771–72 (6th Cir. 1966). After hearings on remand, compulsory licensing of the tetracycline patent was again ordered by the Commission and affirmed on appeal. *American Cyanamid Co.*, 72 F.T.C. 623, 690 (1967), *aff'd, sub nom. Chas. Pfizer & Co.* v. *Federal Trade Commission,* 401 F.2d 574 (6th Cir. 1968), *cert. denied,* 394 U.S. 920 (1969). In issuing its order the Commission further stated that it was not limited to instances of patent abuse in employing compulsory licensing decrees, citing *United States* v. *United Shoe Machinery Corp., supra,* 110 F. Supp. at 351, where Judge Wyzanski stated: [165]

> [Defendant] is being required to reduce the monopoly power it has, not as a result of patents, but as a result of business practices. And compulsory licensing on a reasonable royalty basis, is in effect a partial dissolution, on a non-confiscatory basis. . . . [T]he decree does no more than what defendant's own expert recognized would be appropriate if the Court found defendant had monopolized the shoe machinery market.

A requirement for compulsory licensing of a trademark, such as ReaLemon, is not essentially different from a requirement of compulsory licensing of a patent. Accordingly, it is clear that the Commission has such authority and, as stated, compulsory licensing of the ReaLemon trademark is not only reasonably related to the violation here found, but is indispensable to the restoration of competition in the processed lemon juice industry. In this connection see Dr. Mann (Tr. 499–501, 6131–32; and findings among others, 80 through 87).

Complaint counsel propose a royalty of one-half of one percent of net sales of reconstituted lemon juice made by the licensee, pointing out that the after tax profits for manufacturers of food and kindred products for the three (3) years ending in the third quarter of 1975, was 2.83 percent of sales (FTC Quarterly Financial Reports). Under

these circumstances, and assuming in time the processed lemon juice industry becomes as competitive as the food and kindred products industry generally, the one-half of one percent appears to the law judge to be reasonable, and is probably sufficient to compensate respondent Borden for costs attendant upon such licensing and the quality control requirements. However, if experience with the licensing provision of the order shows after a reasonable time that the [166] cost to Borden of administering the quality control standards exceeds the amount of royalties received from the licensees, Borden may apply to the Commission for a modification of the order, showing the inadequacy of the royalty and the amount which would be sufficient to compensate Borden for its expenses.

Complaint counsel urge that respondent Borden be required to manufacture and pack reconstituted lemon juice, for a period of five years, for any firm other than Golden Crown or Sunkist desiring such an arrangement. The purpose of this co-packing requirement is to facilitate the entry of new producers into the processed lemon juice industry by sparing them the necessity for making an initial capital investment. The record, however, does not provide a basis for such relief.

Processed lemon juice of the type sold by Borden under the ReaLemon brand is a fairly simple product to manufacture requiring relatively inexpensive equipment (Finding 9). Furthermore, complaint counsel assert that co-packing is an "accepted industry practice" (complaint counsel's memorandum in support, p. 110) suggesting that packing facilities are available to new entrants, if needed. The co-packing provision of the proposed order does not appear necessary to restore competition to the processed lemon juice industry, and has therefore been omitted from the order issued herein. [167]

VI

ORDER

It is ordered, That respondent, Borden, Inc., a corporation, for a period of ten (10) years from the date of this order, upon written request from any person, partnership, corporation or business entity engaged in or desiring to enter the business of producing and marketing processed lemon juice, grant a license to such person, partnership, corporation or business entity to use the name "ReaLemon" and the label design of ReaLemon on containers of reconstituted lemon juice. The "ReaLemon" name and label design may be used under such licenses in conjunction with other brand names. Such licenses shall contain no restrictions or limitations, unless approved by the Federal Trade Commission, except the following: (1) licensees must agree to disclose conspicuously on all containers of reconstituted lemon juice produced and marketed pursuant thereto the identity of the manufacturer or distributor, and (2) licenses may contain provisions (a) allowing respondent Borden to collect royalties of not more than one-half of one percent (0.5%) of the dollar sales of **[168]** reconstituted lemon juice produced and marketed thereunder, and (b) providing for reasonable quality control standards for the production of reconstituted lemon juice by licensees, equal to the quality of respondent Borden's ReaLemon reconstituted lemon juice. Such quality control standards shall be administered by an independent third party or parties acceptable to both Borden, Inc., and the licensee, and such party or parties shall be compensated by Borden, Inc. If after a reasonable time it is demonstrated that the one-half of one percent royalty is inadequate to compensate Borden for the cost of administering the foregoing quality control standards, Borden may apply to the Commission for modification of this order, showing the fact and the amount of royalty which would adequately compensate it for such expenses.

It is further ordered, That respondent, Borden, Inc., shall advertise the availability of the licensing provisions of this order in three significant trade journals once every three (3) months for a period of five (5) years from the date of this order. **[169]**

It is further ordered, That Borden, Inc., and its successors and

assigns, officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, affiliate, division or other device, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(1) Granting price reductions, directly or indirectly, which result in different net prices among Borden's ReaLemon customers competing in the same geographic area, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(2) Selling ReaLemon lemon juice below its cost or at unreasonably low prices, the effect of which is to hinder, restrain [170] or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(3) Granting promotional allowances or payments of any kind for customers' promotional services, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice.

It is further ordered, That Borden, Inc., shall, within sixty (60) days from the date of this order becomes final, and periodically thereafter as required by the Federal Trade Commission, submit a detailed written report of its actions, plans and progress in complying with the provisions of this order, and fulfilling its objectives.

Opinion of the Commission

By Pertschuk, *Commissioner:*

The complaint in this proceeding, issued in July 1974, charged Borden, Inc., through ReaLemon Foods, a unit of its Borden Foods division, with unlawfully maintaining monopoly power in the production, distribution and sale of reconstituted lemon juice in the United States. On August 19, 1976, after extensive hearings, Administrative Law Judge ("ALJ") Daniel H. Hanscom issued an initial decision sustaining the complaint, from which Borden has appealed.

The initial decision contains a comprehensive and cogent review of the evidence, in far greater detail than this opinion will permit. The ALJ's order contained several conduct provisions ordering Borden to

cease and desist from certain pricing and promotional practices. Borden was also required, for a period of 10 years, to grant a license for the use of the "ReaLemon" name and label design to any person engaged in or wishing to enter the business of producing and marketing processed lemon juice.

Judge Hanscom found that Borden possessed monopoly power in the production, marketing, and sale of processed lemon juice in the United States, which he found to be the relevant market for analytical purposes. He also found that Borden had unlawfully maintained its monopoly power through a variety of acts and practices. Since the [2] dominance of the "ReaLemon" brand was found to be "the heart of the monopoly power" possessed and preserved by Borden, Judge Hanscom found it necessary to go beyond ordinary cease-and-desist relief and to order compulsory licensing of the "ReaLemon" trademark and label design in order to dissipate Borden's monopoly power and restore competition to the processed lemon juice market.

On appeal, Borden attacks the ALJ's conclusions with regard to the definition of the relevant market, Borden's possession and unlawful maintenance of monopoly power, and the Commission's power to order compulsory licensing of the "ReaLemon" trademark.[1] We affirm the ALJ's conclusions on the liability issues. However, we feel that an appropriately crafted conduct order should permit competition to flourish in the processed lemon juice market, and thus find it unnecessary to reach the question of trademark relief.[2]

The Processed Lemon Juice Industry

In the 1930's Irvin Swartzberg founded the ReaLemon business when he began selling pre-squeezed lemon juice in bottles to bars, hotels and other institutional customers (Tr. 2972–73).[3] The product's original attraction was [3] its convenience, as compared with squeezing fresh lemons. Over the years, ReaLemon began selling its juice directly to consumers, and also changed the composition of the

[1] The United States Department of Commerce and the United States Trademark Association, a non-profit association of businesses, filed *amicus curiae* briefs supporting Borden's position on the trademark licensing issue.

[2] Chairman Pertschuk disagrees with the majority on this issue, as elaborated in his separate opinion on relief.

[3] The following abbreviations are used herein:

ID	Initial Decision (Finding No.)
ID p.	Initial Decision (Page No.)
Tr.	Transcript of Testimony, Page No.
CX	Complaint Counsel's Exhibit No.
RX	Respondent's Exhibit No.
RAB	Respondent's Appeal Brief, Page No.
CAB	Complaint Counsel's Answering Brief, Page No.
RRB	Respondent's Reply Brief, Page No.
RPF	Respondent's Proposed Findings of Fact and Conclusions of Law, Finding No.

product from pre-squeezed fresh lemon juice to a reconstituted product made from lemon juice concentrate, water, and a preservative (ID 9). In the early 1940's the company began to use the "ReaLemon" trademark in connection with its product, and in the ensuing years heavily advertised and promoted ReaLemon brand reconstituted lemon juice. In fact, for years prior to the 1970's ReaLemon was the only nationally advertised and distributed brand of processed lemon juice. In 1962, Borden, Inc., purchased the ReaLemon-Puritan Co. for approximately $12.4 million. In 1973, Borden's sales of ReaLemon reconstituted lemon juice amounted to $22 million, out of total corporate sales of over $2 billion.

Reconstituted lemon juice is used primarily as an ingredient in tea, lemonade, and other foods and beverages. Among the features ReaLemon has stressed in its promotions are the convenience, economy, and shelf life of reconstituted lemon juice.

Processed lemon juice is not difficult to manufacture (ID 9 and p. 166). The raw materials are readily available, although there have been times when lemon juice concentrate has been on allocation. There are no secret formulas or processes involved, and the product can be produced using relatively inexpensive equipment. Any plant which bottles other juices can pack processed lemon juice and, in fact, two of the facilities at which Borden bottles ReaLemon are used to pack other Borden products.

Since its introduction into the market, ReaLemon has dominated the processed lemon juice industry. Sunkist, which is the leading supplier of lemons and lemon juice concentrate to the industry, was once a national competitor, but substantially retrenched in the late 1950's and early 1960's (Tr. 681–82). Other competitors have generally distributed their products only on a local or regional basis (ID 102), and have frequently encountered difficulty in holding on to customers.

As the ensuing discussion will show in greater detail, the primary reason for ReaLemon's longstanding dominance of the processed lemon juice market has been its successful [4] product differentiation. The heavy promotion of the ReaLemon brand has created a strong consumer "franchise" whereby consumers typically associate the name "ReaLemon" with the processed lemon juice product. This product differentiation is artificial in the sense that it cannot be attributed to any superior qualities of ReaLemon.

Product differentiation is critical to this case in two respects: (1) it enabled Borden to price its product at a level substantially above that at which other brands could be sold; (2) it gave Borden an

instrumentality that it could use to prevent competitors from obtaining a secure position in the market.

I. RELEVANT MARKET

In determining whether respondent maintains monopoly power over the marketing and sale of processed lemon juice, our analysis begins with the delineation of the market or "part of commerce" in which it allegedly possesses monopoly power. *United States* v. *E.I. duPont de Nemours & Co.*, 351 U.S. 377, 380 (1956) (*"Cellophane"*).[4] The parties are agreed that the relevant geographic market is the United States as a whole, but are in sharp dispute as to the appropriate product market. Judge Hanscom determined that although the outer boundaries of a broad product market may include fresh lemons, processed lemon juice constitutes a valid submarket within which to test the allegations of the complaint.[5] Borden argues that the ALJ erroneously employed submarket analysis in a monopolization case, and that if the appropriate legal standard were applied, processed lemon juice could not be found to be a market separate and apart from fresh lemons. [5]

A. Legal Standard

Judge Hanscom found that processed lemon juice constitutes "at the least, a valid submarket for antitrust purposes" (ID, p. 142), and concluded that it belonged "in a separate market or submarket from fresh lemons" (ID, p. 148). It is respondent's contention that submarket analysis, which originally developed as a part of the law of mergers, is not appropriate in a monopolization case.

The *Cellophane* case was the Supreme Court's first attempt to provide an analytical framework for definition of relevant markets in antitrust cases. There, the Court delineated the relevant product market within which to test the claim that duPont had monopolized trade in violation of Section 2 as embracing not merely cellophane, of which duPont controlled almost a 75 percent share, but rather all flexible packaging materials, of which duPont's share was under 20 percent. The Court said:

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[4] Although this case was brought and is decided under Section 5 of the FTC Act, it sounds basically in monopolization. Accordingly, the law under Section 2 of the Sherman Act is used to provide guidance for the application of Section 5, both as to the issue of market definition and the substantive standard of illegality. It is clear that conduct constituting monopolization under Section 2 also violates Section 5. See *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 9 (7th Cir. 1971); cf. *FTC* v. *Cement Institute*, 333 U.S. 683 (1948). In relying on the law of Section 2, however, we in no way intimate that the scope of Section 5 is bounded by the scope of Section 2.

[5] Although the complaint alleged reconstituted lemon juice to be the relevant product market, complaint counsel in their pretrial brief shifted the focus of the proceeding to processed lemon juice, which is a slightly broader market consisting of frozen reconstituted lemon juice, processed fresh lemon juice, frozen fresh lemon juice, and imitation lemon juice in addition to the bottled reconstituted variety (ID 8).

> In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal.

351 U.S. at 395. If price changes in one product materially affect the sales of another, such responsiveness, or cross-elasticity of demand, suggests that the products in question should be treated as being part of the same market. *Id.* at 400. Respondent argues, on the basis of the *Cellophane* standard, that the relevant product market in this proceeding "must be nothing less inclusive than the total 'lemon juice' market," including both bottled lemon juice and the juice of fresh lemons (RAB 19).

Six years after the *Cellophane* decision, the Supreme Court elaborated on the appropriate test for market definition in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962). The Court stated: [6]

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

Id. at 325. The Court then described the criteria to be applied in determining the existence of submarkets:

> The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id.

We cannot accept respondent's view that the *Brown Shoe* submarket criteria, by now well established in the law, are of no relevance in this proceeding. The *Brown Shoe* formulation reflects a synthesis of the "reasonable interchangeability" test of *Cellophane* and the "peculiar characteristics and uses" standard employed in *United States* v. *E.I. duPont de Nemours & Co.,* 353 U.S. 586, 593–94 (1957) ("*General Motors*"). Cf. *Sargent-Welch Scientific Co.* v. *Ventron Corp.,* 567 F.2d 701, 710 (7th Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3695 (U.S. May 1, 1978)(No. 77–1566). Thus the same market analysis must be undertaken in actions charging violation of the antimonopoly provisions of the Sherman Act as in actions charging violation of the antimerger provisions of the Clayton Act. See *e.g., Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.,* 512 F.2d 1264, 1271 (9th Cir. 1975).

In *United States* v. *Grinnell Corp.*, 384 U.S. 563, 573 (1966), the Supreme Court observed that there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of [7] the Sherman Act."[6] This view was adopted by the Seventh Circuit in *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 11 (7th Cir. 1971), which expressly held that submarket criteria may appropriately be used to define the relevant market in a monopolization case arising under Section 5 of the FTC Act. Citing *Grinnell*, the court noted that

> [N]o policies have been proffered by petitioners to show why the submarket analysis of Section 7 should not also be applicable to Section 2 cases. The ultimate objective of the criteria is to delineate markets which conform to areas of effective competition and to the realities of competitive practice.[7]

Id. A number of recent Sherman Act cases discussing the issue have recognized the propriety of using submarket analysis in a monopolization case. See, *e.g.*, *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 1978-1 Trade Cas. ¶62,064, at 74,623-24 (3d Cir. May 24, 1978); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 494 n.7 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Cass Student Advertising, Inc.* v. *National Educational Advertising Service, Inc.*, 516 F.2d 1092, 1094-95 (7th Cir.), *cert. denied*, 423 U.S. 986 (1975); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 552-54 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 454-55 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967); cf. *Heatransfer* [8] *Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964, 980 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, *supra*, 567 F.2d at 710-11; *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 304 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). But cf. *United States* v. *Mrs. Smith's Pie Co.*, 440 F. Supp. 220, 230 (E.D. Pa. 1976).

Thus, we believe it is well settled that the same standard for delineation of the relevant market may be applied in cases whether they are brought under the Sherman, Clayton, or Federal Trade

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[6] What was made explicit in *Grinnell* — that "[i]n §2 cases under the Sherman Act, as in §7 cases under the Clayton Act . . . there may be submarkets that are separate economic entities," 384 U.S. at 572, — was intimated prior to *Brown Shoe* in *International Boxing Club, Inc.* v. *United States*, 358 U.S. 242 (1959), a monopolization case. Applying the reasonable interchangeability test enunciated in *Cellophane*, the Court concluded that championship boxing "is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes." *Id.* at 252. In language that bridges the apparent differences in the language of *Cellophane* and *General Motors*, the Court determined that "[b]y analogy [championship boxing] bears those sufficiently 'peculiar characteristics' found in automobile fabrics and finishes such as to bring them within the Clayton Act's 'line of commerce' [citing *General Motors*]." *Id.* at 252 n.8. See also *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960).

[7] The court also observed in this connection that "the Commission under Section 5 is not bound to follow antitrust standards as strictly as the courts must under the Sherman and Clayton Acts." 442 F.2d at 11.

Commission Acts. See *Luria Bros. & Co.*, 62 F.T.C. 243, 604 (1963), *aff'd*, 389 F.2d 847 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968); cf. *L.G. Balfour Co.* v. *FTC*, *supra*, 442 F.2d at 11; *Columbia Broadcasting System, Inc.* v. *FTC*, 414 F.2d 974, 978–79 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

B. Application of Submarket Criteria

On the basis of the *Brown Shoe* criteria, the administrative law judge determined that processed lemon juice was a valid submarket within which to test the allegations of the complaint. After an examination of the record in light of the relevant criteria we agree with the ALJ's conclusion.

1. *Unique Characteristics*

Although it is true that consumers *can* substitute fresh lemons for processed lemon juice (and vice versa) in some and uses-that is, there is some functional interchangeability between the two products - unique taste and convenience factors substantially differentiate processed lemon juice from fresh lemons.[8] Cf. *United States* v. *Grinnell Corp.*, *supra*, 384 U.S. at 573–74; *SmithKline Corp.* v. *Eli Lilly & Co.*, 427 F. Supp. 1089, 1116–18 (E.D. Pa. 1976), *aff'd.* 1978–1 Trade Cas. ¶62,007 (3d Cir. April 3, 1978), petition for cert. filed, 47 U.S.L.W. 3009 (U.S. June 30, 1978) (No. 77–1869); *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887, 891 (S.D.N.Y. 1963); *United States* v. *Mrs. Smith's Pie Co.*, *supra*, 440 F. Supp. at 228; *Union Carbide Corp.*, 59 F.T.C. 614, 653 (1961). Because the processed juice can be stored for longer periods without spoilage (Tr. 980–81, 1202–03, 2630) and, as stressed in ReaLemon promotions (RX 196; RX 203; RX 546, p. 6), can be ready for use without preparation, it has been generally recognized by consumers as a convenience product (CX 2, p. 673). The superior taste and palatability of the fresh [9] juice has been recognized by consumers (CX 286, pp. 16–18) and industry (Tr. 3969) alike. This is attributable partly to the presence in processed juice of sulfur dioxide, which is used as an additive to prevent spoilage (CX 2, p. 674). Because of substantial differences in palatability, many consumers will use the processed variety for general family needs, but reserve the fresh juice for special occasions (Tr. 5025; CX 286, p. 22). Others will do entirely without lemon juice if the fresh variety is unavailable (CX 286, p. 27).

Respondent's experts relied on statistical data comparing the

[8] Some degree of interchangeability does not, by itself, rebut the existence of submarkets. See, *e.g.*, *General Foods Corp.* v. *FTC*, 386 F.2d 936, 940 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

usage patterns and user profiles of fresh lemons and processed lemon juice in concluding that the two products competed in the same relevant market (RX 318–29; Tr. 5144–45, 5755).[9] However, we agree with complaint counsel's expert (Tr. 6127–29) that it is impossible to determine the extent of competition between the two products from the mere tabulation of similar uses and demographic data regarding users of the two products.[10]

2. *Industry and Public Recognition*

The recognition of separate markets or submarkets by industry members has been identified as an important factor in market analysis. See, *e.g., General Foods Corp.* v. *FTC,* 386 F.2d 936, 941 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968). Identifying what firms and what products a particular company views as competitors, both in general corporate decision-making and, in particular, in making pricing decisions, is an important indicium of industry recognition of the bounds of the market. *Id.* See also *Abex Corp.* v. *FTC,* 420 F.2d 928, 930–31 (6th Cir.), *cert. denied,* 400 U.S. 865 (1970); *General Foods, supra,* at 941; *United States* v. *Pennzoil Co.,* 252 F. Supp. 962, 972 (W.D. Pa. 1965). The extent to which industry members recognize other products as exerting competitive influences on them has a direct bearing on the existence and degree of competition. [10]

There is considerable record evidence of respondent's recognition of the processed lemon juice market as a separate and distinct economic entity. Although one objective of respondent's advertising strategies was enlargement of the processed lemon juice market by the conversion of fresh conclusion users to ReaLemon (*e.g.,* CX 3, p. 788), on a day-to-day basis price promotional activities were aimed at the low-priced competition posed by other manufacturers of processed lemon juice (*e.g.,* CX 1, p. 656; CX 2, p. 700; CX 3, p. 792). Respondent's Marketing Plans calculated ReaLemon's market share on the basis of all manufacturers of processed lemon juice, without reference to fresh lemon sales. (CX 1, pp. 639–40; CX 2, p. 669, CX 3, pp. 790–91; CX 4, pp. 853–55). Respondent's assertion that the competitive market includes fresh lemons is further belied by the testimony of the President of the ReaLemon Foods Division, who stated that on a day-to-day basis the concern was with other

[9] Similar statistical data collected by the same organization were held to be unpersuasive in establishing frozen dessert pies to be in the same market as other dessert products in *United States* v. *Mrs. Smith's Pie Co., supra,* 440 F. Supp. 220, 226–27 (E.D. Pa. 1977).

[10] In *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 275 (1964) ("*Alcoa-Rome*"), the fact that insulated copper conductor comprised 22.8 percent of the gross additions to insulated overhead distribution lines, which was the most important end use for insulated aluminum conductor, did not preclude placing the two products in separate submarkets.

manufacturers of processed juice (Tr. 1783). Moreover, correspondence in respondent's own files by and between ReaLemon, Borden, salesmen, and brokers relating to competitive conditions discussed conditions in the processed lemon juice market only. See CX 81.

The evidence shows that other manufacturers of processed lemon juice structured their prices in relation to ReaLemon, and not to fresh lemons (*e.g.*, Tr. 158–89, 546–47, 686–87). In making decisions on purchases of the processed variety, retail grocery buyers did not consider either the price or movement of fresh lemons (*e.g.*, Tr. 1963, 974). Similarly, the Lemon Administrative Committee, which operates under the supervision of the United States Department of Agriculture and determines the volume of lemons to be shipped pursuant to the federal marketing agreement, does not consider the availability of processed juice in reaching its determinations. (Tr. 1712–13).

3. *Price Differences*

Substantial price differences may place two products in separate markets, although price alone will not always be a determining factor. Compare *Cellophane, supra,* 351 U.S. at 396, with *Philadelphia World Hockey Club, Inc.,* v. *Philadelphia Hockey Club, Inc.,* 351 F. Supp. 462, 501–02 (E.D. Pa. 1972). See also *Alcoa-Rome, supra,* 377 U.S. at 276. In the *Hockey Club* case the district court's determination that major league professional hockey was a separate market from minor and amateur league hockey was based in part on a much higher average ticket price for major league hockey than for the other two. See also *International Boxing Club, Inc.* v. *United States,* 358 U.S. 242, 250–51 (1959). The evidence shows that juice squeezed from fresh lemons [11] costs from three to five times more than ReaLemon, and from four to seven times more than other bottled lemon juices, depending upon fluctuations in the price of fresh lemons. The substantial price difference was stressed in ReaLemon advertising (Tr. 4557; RX 546, p. 6; RX 375). Complaint counsel's economic expert testified that a sustained price differential of this magnitude is itself strong evidence that the two products are not close substitutes (Tr. 6130, 6186–87). Cf. *General Foods, supra,* 386 F.2d at 942; *Reynolds Metals Co.* v. *FTC,* 309 F.2d 223, 229 (D.C. Cir. 1962).

4. *Price Sensitivity*

Since market analysis concerns the identification of products that exert competitive pressures on the product in question, products that

respond to each other's price changes are likely to be included in the same relevant market, while products that do not exhibit such responsiveness may be held to be in separate markets. See *Cellophane, supra,* 351 U.S. at 400. The record is replete with evidence that competitive conditions in the fresh lemon market have no impact on the sales or price of processed lemon juice (*e.g.,* Tr. 4557). Buyers for the large grocery chains testified that increases in the price of fresh lemons are not accompanied by an increase in the sales of the bottled variety (Tr. 1521–22; Tr. 2628–29). Moreover, the price of fresh lemons changes on a week-to-week basis (Tr. 4623; CX 371) while the price of ReaLemon exhibits much less volatility (*e.g.,* CX 37–54). Cf. *SmithKline, supra,* 1978–1 Trade Cas. at 74,303; *General Foods, supra,* 386 F.2d at 942.

Respondent's expert witness conducted a study of the "elasticity of substitution,"[11] between processed lemon juice and fresh lemons, the results of which purported to show substantial interchangeability between the two products (RX 330–34; Tr. 5187, 5760–61). We agree with the ALJ [12] that there are substantial defects in the study, particularly in the absence of a reliable figure for "own-price elasticity."[12] See ID pp. 137–42. We do not view respondent's study or the conclusions drawn therefrom as reliable, in the face of the overwhelming evidence in the record demonstrating that processed lemon juice and fresh lemons may be found to be in separate markets.[13]

5. *Other Submarket Criteria*

The marketing of products through distinct channels of distribution has been recognized as a factor indicating that the products are in different competitive markets. See, *e.g., United States* v. *Mrs. Smith's Pie Co., supra,* 440 F. Supp. at 229; *United States* v. *Blue Bell, Inc.,* 395 F. Supp. 538, 546 (M.D. Tenn. 1975). Fresh lemons are marketed through produce brokers, who then sell through produce wholesalers (Tr. 744, 6203), while processed lemon juice is sold through grocery brokers or salesmen (Tr. 130, 149–50, 540). It is

[11] "Elasticity of substitution" is a measure of how the ratio of the demands for two products changes as the ratio of their respective prices changes (Tr. 5149).

[12] "Own-price elasticity" refers to the effect of a product's own price on its demand (Tr. 5169). Obviously, unless one knows how much of a change in demand for a product is caused by changes in its own price, one cannot determine with any assurance how much is attributable to the change in another product's price (*e.g.,* Tr. 6027). Because respondent's expert did not have data for the own-price elasticity of fresh lemons or processed lemon juice, he used sugar, for which such data were available, as a proxy. The testimony of complaint counsel's expert that such a choice was speculative, which we find persuasive, casts doubt on the validity of the conclusions (Tr. 6029–30).

[13] Even if the data accurately represented the elasticity of substitution between the two products it appears that the figure derived is well below the range in which two products would be considered in the same market (Tr. 6033–38; see also Tr. 6124–26).

particularly significant that Sunkist and Ventura Coastal, which sell both fresh lemons and processed juice, have separate marketing groups for distribution of the two products. (Tr. 678; 738–39).

Finally, it is clear that fresh lemons and processed lemon juice are produced in very different facilities, and there is no supply-side interchangeability between the two products (ID 68). [13]

C. Summary

To summarize, our examination of the factors outlined in *Brown Shoe* in light of the record developed in this proceeding supports the conclusion that processed lemon juice constitutes the relevant product market within which to test the allegations of the complaint.

Moreover, on this record, the supply and demand characteristics and relationships of processed lemon juice and fresh lemons are sufficiently distinct that they are not "reasonably interchangeable" within the meaning of *Cellophane.* Cf. *United States* v. *Grinnell Corp., supra,* 384 U.S. at 573–75; *SmithKline, supra,* 1978–1 Trade Cas. ¶62,007 (3d Cir. April 3, 1978), petition for cert. filed, 47 U.S.L.W. 3009 (U.S. June 30, 1978) (No. 77–1869). In particular, the significant and longstanding price difference between the two products, and the lack of any demonstrated price responsiveness between them, persuade us that processed lemon juice is an appropriate "part of commerce" in this case even without resort to the *Brown Shoe* criteria. See Tr. 6130.

II. MONOPOLIZATION

The offense of monopolization has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States* v. *Grinnell Corp.,* 384 U.S. 563, 570–71 (1966).

A. Monopoly Power

Monopoly power is defined as the power to control prices or exclude competition. *United States* v. *Grinnell Corp., supra,* 384 U.S. at 571; *Cellophane, supra,* 351 U.S. at 391 (1956); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 811 (1946). The existence of monopoly power can ordinarily be inferred from a predominant share of the market. *United States* v. *Grinnell Corp., supra,* at 571. The record demonstrates that Borden possesses monopoly power, as it is commonly understood, in the processed lemon juice market.

ReaLemon has persistently controlled a monopoly share of the processed lemon juice market. Data compiled by complaint counsel show that during 1969–74, Borden's market share ranged from 75.3–88.7% on a gallonage basis and 77.8 - 88.9% on a dollar basis [14] (CX 239; Tr. 2806). Similar estimates are derived from Borden's marketing plants. For example, data collected and published by Selling Areas - Marketing, Inc. ("S.A.M.I.")[14] showed ReaLemon's nationwide market share hovering around the 90% mark during 1970–72 (CX 1, p. 639; CX 2, pp.668, 706; CX 3, pp. 737, 759). In April - May 1974, "S.A.M.I." data showed Borden holding market shares over 70% in 27 of 30 major metropolitan markets, over 80% in 17 such markets, and over 90% in 7 such markets (CX 258). Similarly, for the 52 weeks ending August 31, 1973, Borden's market share exceeded 70% in 23 of the same 30 markets, and exceeded 80% in 12 such markets. (CX 4, p. 883). Local market breakdowns indicate continuous dominance by ReaLemon in most metropolitan areas throughout 1971–74, with market shares generally well in excess of 75% (CX 258).

Without question, these market shares are well within the range of those found to evidence monopoly power in prior cases,[15] and show sufficient dominance on the part of Borden to justify an inference of monopoly power. *United States* v. *Grinnell Corp., supra.*

We need not rely solely on inferences drawn from dominant market share, however, for the record offers ample evidence that Borden possessed and exercised the power to control prices and exclude competition. Although ReaLemon brand reconstituted lemon juice is virtually [15] indistinguishable in its properties from competing brands of processed lemon juice (*e.g.*, CX 1, p. 650; CX 2, p. 673),[16] ReaLemon was consistently able to command a substantial price premium over the price at which other brands sold (*e.g.*, Tr. 973, 1188, 1515–16, 1628, 1850, 1960–61, 1987, 2104–06, 2606–07). As the 1971 ReaLemon Marketing Plan stated:

In a completely unique situation, ReaLemon Lemon Juice presently commands a

[14] Selling Areas - Marketing Inc. is a recognized, well-established market research organization. "S.A.M.I." data are considered reliable and are used by Borden and its competitors in making business decisions (ID 71).

[15] *E.g., United States* v. *Grinnell Corp., supra.* 384 U.S. at 567 (87%); *International Boxing Club, Inc.* v. *United States,* 358 U.S. 242, 249 (1959) (81%); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 796–97 (1946) (68%); *Case-Swayne Co.* v. *Sunkist Growers, Inc.,* 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds,* 389 U.S. 384 (1967) (67%); *Power Replacements Corp.* v. *Air Preheater Co.,* 356 F. Supp. 872 (E.D. Pa. 1973) (75%). See also *Greyhound Computer Corp.* v. *International Business Machines Corp.,* 559 F.2d 488, 496 n.18 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040 (1978).

[16] It appears that Golden Crown, a competing brand, may have sold an adulterated product (ID pp. 131–32), and it is thus possible that consumers may have preferred the taste of ReaLemon to Golden Crown (see CX 3, p. 756; but see, *e.g.*, Tr. 1514). However, the record does not indicate any objective differences in quality between ReaLemon and any of the other brands of processed lemon juice, and ReaLemon's Marketing Plans acknowledged the fungible nature of the product (ID 83).

premium of as high as 25 to 30 cents per unit over competitive offerings. No such differential on any other foods product, frozen or non-frozen, exists anywhere in the industry.

CX 1, p. 665. The premium sometimes exceeded 30%. (CX 3, p. 740; CX 4, p. 855). This price differential, achieved through the successful differentiation of the ReaLemon brand, served as the instrument by which Borden could control prices and entry in the processed lemon juice market.

The ReaLemon brand provides almost a case study of product differentiation. In the 1972 Marketing Plan, ReaLemon's president described the brand as "one of the greatest brand names in the history of the supermarket" (CX 2, p. 670). Witnesses consistently referred to the ReaLemon name as "almost generic" (Tr. 1284), or "almost a generic term" (Tr. 1022); as one grocery buyer put it, "Lemon juice was almost synonymous, as far as a grocery product was concerned, with ReaLemon" (Tr. 1514; see also Tr. 3436 ("synonymous with the name")). Another grocery buyer summarized ReaLemon's success in differentiating its brand name from other competing brands:

> Personally I think that the ReaLemon people, being in the Wisconsin market, for the length of time that they have built a brand image that they have, that when a consumer walks into a retail store to pick up a bottle of concentrated [16] lemon juice, she's got in her mind that it is ReaLemon, regardless of whose it is; and we found this true in many other categories that we carry.
>
> The first in, that constantly promotes their own brand themselves, seems to almost create a brand identity in the consumer's mind that she just can't get out of it.

Tr. 1960–61. See generally ID 83–85. That this was Borden's intention is clear from the objective stated in the 1971 Marketing Plan.

> Although reconstituted lemon juice is virtually indistinguishable one brand from another, heavy emphasis on the ReaLemon Brand name through its media effort should create such memorability for the brand, that an almost imaginary superiority would exist in the mind of the consumer, a justification for paying the higher price we are asking.

CX 1, p. 650.

Dr. Michael Mann, complaint counsel's economic expert, testified that a new entrant into a market dominated by a firm with a successfully differentiated product such as ReaLemon might try to detach customers from the dominant brand by charging a lower price. The firm in the dominant position could then reduce its price, to narrow or even eliminate the price differential, and thereby prevent the new entrant from becoming a significant competitor.

The new entrant would then be forced to respond by further lowering its price so as to restore the original price differential which is considered necessary to detach customers. Dr. Mann testified that this could set in motion a "ratchet effect" that could ultimately drive the entrant out of the market, since the price charged by the new entrant would likely be the first to fall below average variable cost. (Tr. 956–57; ID 96–97).

It is precisely this situation that existed in the processed lemon juice market. ReaLemon's competitors perceived the need to price their products at a level below ReaLemon in order to capture sales and supermarket shelf space (Tr. 158–59, 650–52, 687). ReaLemon likewise recognized its ability to preserve its dominant market share by maintaining the existing price differential vis-a-vis competing brands (ID 99). [17]

The Commission discussed the effect of product differentiation as an entry barrier in *Procter & Gamble Co.,* 63 F.T.C. 1465 (1963), *vacated & remanded* 358 F.2d 74 (6th Cir. 1966), *rev'd,* 386 U.S. 568 (1967):

> [I]n an industry in which product differentiation is an important factor, not only may the new entrant find it especially difficult to pry customers loose from the established firms, but the higher price obtainable for a brand that has been successfully differentiated in the public mind from competing brands may impart a flexibility in pricing, akin to that imparted by cost advantages, which the newcomer may not be able to achieve for many years.

63 F.T.C. at 1553. The successful differentiation of the ReaLemon brand thus served not only as a restraint on competitors' prices, but as a barrier to entry.

There was abundant industry testimony to the effect that supermarket shelf space is limited, and that if a supermarket had room on its shelves for only one brand of lemon juice, that brand would be ReaLemon (ID 86). The record also establishes that Borden enjoyed tremendous advantages over its competitors in terms of advertising and promotion (ID 91–94). For example, between 1969 and 1973 ReaLemon spent $3.8 million on advertising (CX 288), while competitors' expenditures were negligible (CX 2, p. 681; CX 3, p. 772). ReaLemon's total expenditures on advertising and promotion during the same period were $13.8 million (CX 288).

Finally, although there is sharp dispute between the parties as to whether ReaLemon earned an above average rate of return on assets, the weight of evidence supports the ALJ's finding that ReaLemon persistently earned a rate of return far above the norm,

both for manufacturing corporations generally and for food [18] manufacturing corporations. (ID 89-90; Tr. 6118, 6121).[17] This persistent high profitability is further evidence of Borden's monopoly power (Tr. 6131, 6152). See *United States* v. *General Electric, Co.*, 82 F. Supp. 753, 894-95 (D.N.J. 1949).

Thus, with a dominant share of the market, a dominant tradename which was virtually synonomous with processed lemon juice, a persistent ability to command supermarket shelf space and premium prices despite an essentially fungible product, and high profitability, Borden clearly possessed monopoly power in the processed lemon juice market.

B. Maintenance of Monopoly Power

Under the *Grinnell* test, *supra,* it is not sufficient to show the mere possession of monopoly power; it must also be shown that that power was [19] willfully acquired or maintained. Since ReaLemon was the first firm to develop and market a bottled lemon juice, it naturally had a monopoly in that market at the outset.[18] The record makes clear, however, that it later took steps to ensure that that monopoly position would not be lost or eroded, and engaged in acts and practices designed to frustrate competition.

1. *General Principles*

It is important to recognize that acts and practices need not in themselves be independently unlawful or predatory to constitute acts and practices of monopolization. See *e.g., United States* v. *Griffith,* 334 U.S. 100, 105 (1948); *American Tobacco Co.* v. *United States* 328 U.S. 781, 809, 814 (1946); *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 431-32 (2d Cir. 1945) *("Alcoa"); United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 344-45 (D. Mass.

[17] The parties disagree as to whether, in computing ReaLemon's rate of return on assets, one should disregard the sum of $9,602,895, which represents the difference between the price Borden paid for the ReaLemon-Puritan Company and that company's adjusted net worth at that time. Complaint counsel's witness computed rates of return excluding that figure, and arrived at rates ranging from 16.9 to 35.2% during 1968-73 (CX 294). This compares, for the same period, with a range of 5.0 to 6.9% for all manufacturing corporations, and 5.5 to 6.4% for the food and kindred products industries (CX 300-01). Respondent argues that the $9.6 million figure is appropriately treated as good will, and hence part of the asset base for computation of rate of return. By respondent's calculation, ReaLemon's rate of return ranged from 8.1 to 10.2% during 1968-1973 (RX 363).

If ReaLemon had never been acquired by Borden, a value would never have been placed on ReaLemon's "good will" (Tr. 4914), and, consequently, ReaLemon's profitability as an independent entity would be calculated without reference to any such figure. Since the $9.6 million in Dr. Mann's words, "discounted a rather handsome stream of future earnings " (Tr. 6118), we agree with the ALJ that there is good reason to exclude it from the total assets upon which the rate of return is computed. We also note that even if respondent's calculations are used, ReaLemon earned a rate of return during the period 1963-1973 which was roughly one and one-half times that of all food and kindred products firms, a difference which some economists, including Dr. Mann, regard as indicative of market power (Tr. 6117-18).

[18] Borden acquired the ReaLemon-Puritan Co., the original maker of ReaLemon, in 1962 (ID 2).

1953), *aff'd per curiam,* 347 U.S. 521 (1954). When a firm possessing monopoly power uses that power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor," *United States* v. *Griffith, supra,* 334 U.S. at 107, it is guilty of monopolization. Moreover, the cases establish that a firm that has monopoly control of a market may not engage in practices that are designed to continue such control. *Greyhound Computer Corp.* v. *International Business Machines Corp., supra,* 559 F.2d at 503; *Alcoa, supra,* 148 F.2d at 432; *United Shoe Machinery Corp., supra,* 110 F. Supp. at 345. Here, as set forth above, Borden possessed monopoly power in the relevant market, which was rooted largely in its successful and spurious product differentiation that enabled it to command a substantial price premium over essentially identical offerings of other sellers, as well as to have a virtually unshakable spot on the grocer's shelf. Borden's manipulation of this price differential was a key element in its ability to resist competitive inroads and maintain its monopoly share of the market.

Alcoa contains perhaps the most eloquent statement of the law of monopolization. There, Alcoa had for years maintained a 90% share of the relevant market. It had achieved its dominance through a combination of patents [20] and various unlawful practices; the former expired in due course, and the way in which Alcoa thereafter maintained its monopoly share of the market for 28 years was the issue in the case before the Court of Appeals.[19]

The principal "conduct" attributed to Alcoa in support of the assertion that it had "monopolized" the market for aluminum ingot[20] was its practice of expanding existing plants and constructing new facilities in anticipation of increased demand for the product. This expansion of capacity had the effect of discouraging and frustrating entry into the field by other firms. Judge Learned Hand, writing for the court, delineated the proper means of analyzing the conduct of a firm with monopoly power:

> We need charge it with no moral derelictions after 1912; we may assume that all it claims for itself is true. *The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market.* It seems to us that that question scarcely survives its statement.

148 F.2d at 431 (emphasis added). Reviewing Alcoa's expansion policy, the court stated that it could "think of no more effective

[19] Because there was not a quorum of the Supreme Court to hear the Government's appeal, the case was referred to the Second Circuit sitting as a final appellate court pursuant to a statute now codified at 28 U.S.C. 2109.

[20] Other practices of Alcoa were alleged to be unlawful, but these were considered wholly apart from the question whether Alcoa had unlawfully "monopolized" the ingot market. 148 F.2d at 432.

exclusion than to embrace each new opportunity as it opened," and concluded:

> Only in case we interpret "exclusion" as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

Id.

[21] While *Alcoa* was an opinion only of one court of appeals[21], its authority is well-recognized, and one year later, in *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946), the Supreme Court "welcome[d] this opportunity to endorse" the conclusions of the *Alcoa* court, including the last-quoted passage. *Id.* at 813–14. See also *Hanover Shoe, Inc.* v. *United Shoe Machinery, Inc.,* 392 U.S. 481, 496–502 (1966).

One point made clear by the *Alcoa* case is that the conduct of firms with monopoly power is viewed differently from that of firms without such power.[22] Taken together, *Alcoa, American Tobacco* and *United States* v. *Griffith, supra,* lead to the conclusion that firms with monopoly power may not maintain that power through means which are not economically inevitable. Cf. *United States* v. *United Shoe Machinery Corp., supra,* 110 F. Supp. at 343.

This conclusion follows naturally from the strong policy of the antitrust laws, to which monopoly is repugnant.[23] These policies have been described many times in many places, not least in the decisions of this Commission. For present purposes, we feel that the *Alcoa* opinion nicely summarizes some of these policies:

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.
>
> * * * * * * *
>
> [22] Throughout the history of [the antitrust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

[21] But see note 19 *supra.*

[22] As the Ninth Circuit stated in *Greyhound Computer Corp., supra:* "If the jury concluded that IBM possessed monopoly power in the leasing of general purpose computers, IBM would be precluded from employing otherwise lawful practices that unnecessarily excluded competition from the submarket." 559 F.2d at 498, citing *United Shoe Machinery Corp., supra.* Cf. *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 155 (1951).

[23] See generally Turner, *The Scope of Antitrust and Other Regulatory Policies,* 82 Harv. L. Rev. 1207, 1217–24 (1969), arguing that Section 2 of the Sherman Act can be applied to monopoly power that has been persistently maintained over a substantial period of time, except where based solely on economies of scale or unexpired patents.

Id. at 427, 429. Some monopolies are inevitable, some are natural, and others are "thrust upon" their owners. But where a firm with monopoly power interfers with natural economic forces which would otherwise dissipate its monopoly, the law rightfully condemns it.

In light of these overriding policies we must determine whether Borden's maintainance of monopoly control over the processed lemon juice market was economically inevitable, or whether, like Alcoa, it "meant to keep, and did keep" that control over the market with which it started. *Id.* at 432.

2. *Borden's Unlawful Maintenance of Monopoly Power*

That Borden, in the words of the *Alcoa* court, "meant to keep" its monopoly share is evident from its marketing plans. For example, its 1971 Marketing Plan described the company's long range objective as expanding the total market for processed lemon juice, inasmuch as ReaLemon had "become a protective umbrella over all lemon juice activity," and increase in overall demand would redound to ReaLemon's benefit (CX 1, p. 649). The Plan went on to describe Borden's "Short Range Objectives" as follows:

> 1. The spread between ReaLemon prices and those of competitors preclude any possibility of price increases to offset higher costs. By not permitting this spread to increase, at the expense of short term profits, ReaLemon anticipates maintaining its market share close to its present level. Market share is the key, since industry or total market growth will be reflected more toward ReaLemon than its competitors by virtue of ReaLemon's present 90% market share. [23]
>
> 2. Although reconstituted lemon juice is virtually indistinguishable one brand from another, heavy emphasis on the ReaLemon Brand name through its media effort should create such memorability for the brand, that an almost imaginary superiority would exist in the mind of the consumer, a justification for paying the higher price we are asking.

CX 1, pp. 649–50. This document evidences Borden's intent to hold on to its monopoly share of the market by sacrificing somewhat higher prices over the short-run to assure continued monopoly returns over the long haul. Borden's ability to achieve this objective, the record demonstrates, rested on the price premium it enjoyed and its ability to manipulate that price differential to the detriment of competitors.

The 1971 Marketing Plan further described one technique by which Borden sought to carry out its goal of maintaining a monopoly. This involved the use of geographically discriminatory promotional allowances. In prior years allowances had ranged from 60 to 90 cents per case, or 5 to 5 1/2 cents per bottle. The Plan described a proposed change in promotional policy:

Based on the success of these promotions in the past, ReaLemon will repeat them in 1971, with variations. *In those markets where competition has been making inroads, tentative plans are to increase the size of the allowances to as much as $1.20 per case, or 10¢ per bottle . . .* We will again be specifically attacking the problem of the retail price spread between ReaLemon and competition. *In general terms, competitive activity exists in the Eastern half of the United States and for the Western Half, promotional allowances will be limited to a range of 60 to 75 cents per case.*

CX 1, pp. 656–57 (emphasis added). In other words, the price would be reduced selectively in those areas where some competition had arisen, but would be kept high in other areas.

Similarly, the 1973 Marketing Plan summarized the strategy for that year in terms of two objectives. "Reversal of competitive inroads in ReaLemon market share," and "Increased category growth" (CX 3, p. 741). ReaLemon's national market share at that time was 88% (CX 3, p. 759). "Strengthening of the consumer franchise to justify the price differential versus Golden Crown" was seen as a major opportunity (CX 3, p. 758). [24]

The key strategy for ReaLemon in the 1973 Plan was to continue the geographically selective promotional policy, discriminating between "highly competitive" and "moderately or low competitive" localities, with the objective of boosting market share from 86.5 to 89.0% (CX 3, pp. 784, 786, 787).

For 1974, the Marketing Plant targeted four "key districts" - New York, Philadelphia, Chicago and Detroit - for major efforts to increase ReaLemon's market share, as part of an overall plan "to reduce Golden Crown share by 20%" (CX 4, p. 864). Since these target districts were areas in which Golden Crown had made considerable gains, and in which per capita consumption of lemon juice was high, it was felt that "[d]ecreasing Golden Crown effectiveness in these markets may result in a significant reduction of expansion leverage" (*Id.*).

Once again, geographic price discrimination was the strategy chosen by ReaLemon to achieve its objective of reversing the Golden Crown inroads. ReaLemon's plans for its spring promotion were to continue the winter 1973 level of $2.25 per case in the four key areas mentioned above, while reducing allowances elsewhere by some 30% (CX 4, p. 872). The budget for promotional expenses continued the steady increases exhibited since 1967 (ID 125). See also CX 4, pp. 884, 892–94, which graphically depicts the way promotional allowances and co-op advertising allowances were manipulated on a geographic basis. Similarly, planned price increases for quart bottles of ReaLemon, occasioned by cost increases, were not to go into effect in "highly competitive Golden Crown markets," while the list price was to be increased by 15 cents per case elsewhere (CX 4, p. 873).

The record indicates that Borden carried out the anticompetitive pricing practices set out in the ReaLemon marketing plans.[24] In particular, geographic price discrimination was a key element in Borden's strategy to maintain its monopoly share of the processed lemon juice market. [25] In 1969 Borden departed from its uniform nationwide pricing system and divided the nation into two zones for pricing purposes, and in 1970 switched to a three zone system (ID 132).[25] Since then Borden has maintained a lower price in Zone 2, which comprises the Northeastern United States, than in the other two zones (ID 131); coincidentally, Zone 2 is where Borden has faced the most serious competitive inroads, notably those of Golden Crown. The lower prices in Zone 2 are not attributable to lower costs; in fact, the evidence shows that Borden's costs of production were higher at its Eastern plant than at its Chicago plant (ID 131).[26] With respect to list prices, the record shows that Borden was able to command a price considerably in excess of that of competing brands, and that it reduced that price selectively in areas where it wished to suppress emerging competition.

More important in Borden's scheme of discriminatory area pricing were discriminatory promotional allowances. Such allowances, whether deducted directly from the invoice or "billed back," *i.e.*, subsequently remitted, amount to price reductions (to the retailer) designed to induce the retailer to promote the manufacturer's product or to offer it for sale at a reduced price (ID 134).

While price promotions represent "temporary" reductions from list price, their importance in the overall marketing scheme should not be underestimated. In 1972, fully 71.1 percent of ReaLemon's sales in the 32-ounce size bottle were "on deal," that is, made during a price promotion (CX 4, p. 872). ReaLemon's 1974 Marketing Plan estimated that in 1973 that percentage rose to 84.1% *(Id.)*. Clearly the price during promotional periods has more practical significance than list price in examining Borden's pricing policies. Until 1971, Realemon's policy with respect to price promotions was to offer such allowances on a uniform nationwide basis (ID 135). In 1971, Realemon adopted the policy of tailoring the amounts of promotional allowances to the competitive situation in individual areas. In [26] that year it increased the allowance in 15 of its highest volume Eastern markets where it faced new competition, to reduce the price

[24] See generally ID 128–30, which recounts intra-corporate correspondence concerning Borden's efforts to implement the strategies and objectives of the marketing plans.

[25] Zone 1 consists of the Midwestern states, Zone 2 the Northeast, and Zone 3 the South and West. Borden produces ReaLemon at plants in Chicago, upstate New York, and California.

[26] Similarly, lower distribution costs do not explain the difference, since f.o.b. plant prices were also lower in Zone 2 (ID 131).

differential between ReaLemon and competing brands, and thereby preserve its market share (Tr. 4468–69).[27]

In the summer of 1973, for example, Borden was offering promotional allowances of only 90 cents per case in areas where there was little significant competition (CX 180). Yet, allowances amounted to $1.50 in more competitive cities in the Northeast and North Central regions, and were increased to $1.80 in Philadelphia and to $2.00 in Atlanta, Dallas, and Florida (*Id.;* RX 561; Tr. 4731–32). See also ID 141–44. These allowances translated into reductions of 10 cents or more per quart bottle at the retail level (*e.g.,* CX 2, p. 677).

A summary of the evidence relating to geographic price discrimination reveals that ReaLemon historically sold at a premium price relative to competing brands while maintaining a dominant share of the market, both nationally and in numerous metropolitan areas. The emergence of a new competitor, Golden Crown, which marketed, priced, and promoted its product aggressively in certain local markets, caused Borden to seek ways to hold on to its dominant share of the market.[28] It did so by selective price cuts (either through reductions in list price or through promotional allowances) that were aimed at reducing the price spread between Borden and its competitors, including Golden Crown, with the intent of forestalling competitive inroads. Borden's price cuts and promotional allowances were considerably higher in areas where competition was perceived as strong than in areas where it faced only weak competition, and were undertaken with the specific intent of recapturing market share from Golden Crown. [27] Borden recognized that reducing the price of ReaLemon left competitors with the choice of correspondingly reducing their own prices to maintain the traditional differential, hence threatening their own profitability, or losing market share.

There is also evidence in the record showing that Borden sold to competing customers in the same local market at different prices, without cost justification. In Philadelphia and Buffalo it appears that favored retailers who were the leading chains in their respective areas received the benefit of discriminatorily lower prices (through additional promotional and cooperative advertising allow-

[27] These levels were reduced in the summer of 1972, and then increased once again in the winter of that year (Tr. 4470–71).

[28] Borden contends that Golden Crown was pricing below *its* costs in attempting to capture market share from ReaLemon. We agree with the ALJ that whatever the truth of this contention, it is no defense to the monopolistic practices of Borden (ID 200 and pp. 160–61). Clearly, only by offering an especially attractive price (even if it fell below its own costs) could Golden Crown hope to obtain a secure foothold in supermarkets and sustain a challenge to ReaLemon. Cf. III Areeda & Turner, *Antitrust Law,* ¶716, contending that temporary promotional pricing, even when below cost, by new entrants or small firms without monopoly power, should be permitted, and should be prohibited only when engaged in by a monopolist.

ances) (ID 147–65). These discriminations had the short-term effect of preventing these customers from buying from Borden's competitors (ID 152, 164) and are indicative of Borden's overall strategy of using the pricing mechanism selectively, including discriminations arguably within the reach of the Robinson-Patman Act, to restrain competition.

The complaint also charged Borden with selling ReaLemon juice below cost or at unreasonably low prices with the effect of injuring, suppressing or destroying competition. One view of predatory pricing holds that pricing by a monopolist below marginal cost is predatory,[29] and that average variable cost, which can be ascertained with some precision, is a valid proxy for marginal cost, which is considerably more difficult to determine.[30] The [28] parties introduced considerable evidence on the issue of whether Borden sold ReaLemon in 32-ounce bottles to Acme Markets in Philadelphia and Niagara Frontier Services in Buffalo at prices below its average variable cost.

Complaint counsel and respondent offered differing computations of Borden's average variable cost of producing cases of ReaLemon quarts for distribution in Buffalo and Philadelphia during 1971, 1972 and 1973 (Compare CX 293 with RX 654). The ALJ accepted Borden's calculations, and concluded that ReaLemon juice was not sold below cost (ID 187, 192).

Borden's and complaint counsel's computations differed in the treatment of advertising expense, average selling expense, and distribution costs. We agree with Judge Hanscom that respondent's treatment of average selling expense is preferred (ID 180–81),[31] and we are not persuaded on this record that advertising costs should be included in the computation of average variable cost (ID 179).[32] On

[29] See, *e.g., Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 857–58 (9th Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3755 (U.S. May 30, 1978) (No. 77–1706). See also R. Posner, *Antitrust Law: An Economic Perspective* 188 (1976); Areeda & Turner, *supra* note 28, ¶715; but see Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977). We do not find it necessary to decide whether this is the exclusive, or even the preferred, test for predatory pricing. Commissioner Pitofsky's concurring opinion points out some of the shortcomings of a strict marginal cost pricing rule in the situation where a monopolist enjoys a substantial price premium derived from successful product differentiation. However, the ALJ and the parties both utilized this approach, and we find it a useful one for illuminating the issue.

[30] Areeda & Turner, *supra*, ¶715d. Marginal cost is simply the added cost of making and selling the last unit. *Id.* Variable costs are costs which vary as output varies, as distinguished from fixed costs, which remain constant at differing levels of output. *E.g.*, Tr. 2791.

[31] In computing average variable cost, Borden included only that portion of average selling expense attributable to commissions paid to brokers and salesmen, while complaint counsel included the entire average selling expense figures (ID 180). The latter figure includes sales managers' salaries and administrative costs, such as sales offices, items which complaint counsel's expert conceded are fixed costs (Tr. 4701–02). We accept Judge Hanscom's adoption of respondent's treatment of this element of cost.

[32] But see III Areeda & Turner, *supra*, ¶715c at 173–74, contending that advertising and promotional expenditures should be included in the computation of variable costs. This is the conclusion adopted by Commissioner Clanton in his concurrence. However, the record reflects that ReaLemon's advertising expenditures

(Continued)

the issue of average distribution costs [29] we are inclined to view complaint counsel's approach as more reliable.[33]

While it does not appear that ReaLemon was sold below average variable cost, at least not as a consistent course of conduct, it does appear that Borden sold below average *total* cost, when fixed costs are added in. Professor Posner has offered an alternative definition of predatory pricing to the short-run marginal cost rule proposed by Areeda and Turner. [30] R. Posner, *Antitrust Law: An Economic Perspective* 188–93. Posner would condemn pricing at a level calculated to exclude from the market an equally or more efficient competitor. *Id.* at 188. Two practices fit his definition: selling below short-run marginal cost; and selling below long-run marginal cost with the intent to exclude a competitor. He would use average *total* ("balance sheet") cost as a surrogate for long-run marginal cost. *Id.* at 190.[34]

The record does not indicate that Borden was more efficient than Golden Crown (the only competitor for which cost estimates are available in the record). The lowest figure in the record for the variable cost of producing cases of ReaLemon quarts during 1971–73 was $3.58, respondent's estimate for the costs of ReaLemon shipped to Acme Markets in Philadelphia on a "direct shipment" basis in 1971 (RX 654). Respondent's high estimate was $4.02 *(Id.)*. Complaint counsel's calculations for the same period ranged from $3.84 to $4.39 (CX 293). ReaLemon estimated Golden Crown's cost of ingredients (including an adjustment for suspected adulteration), distribution, selling, and overhead at $3.74 per case (CX 3, p. 762). Golden Crown's president estimated his firm's costs at $3.11 before freight and selling expenses, and approximately $4.00 including those items (CX 145; Tr.

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did not vary, at least in the short run, with the level of output. For example, Borden spent more on advertising in 1969 than in any of the subsequent four years, although sales increased almost steadily throughout that period (CX 288, 292). This is not surprising, inasmuch as advertising represents, at least in part, an investment in future consumer preference. Thus, advertising seems more like a long-run than a short-run marginal cost, and we will accept Judge Hanscom's exclusion of advertising from the computation of average variable cost.

[33] Complaint counsel computed the distribution component of their average variable cost figure by using average nationwide figures for ReaLemon, which is the manner used by Borden in its own internal computations (ID 182, 184; Tr. 5660–61). These records are used, *inter alia*, for the purpose of keeping ReaLemon senior management advised of current operating costs (Tr. 4445). Borden, on the other hand, for the purpose of introducing evidence in this proceeding, attempted to calculate the actual cost of distributing ReaLemon juice to the customers in Philadelphia and Buffalo, Acme and Niagara, which were the alleged beneficiaries of below cost sales (ID 183). Ideally, as complaint counsel's expert testified, it would be preferable to have precise actual data in determining average cost for particular customers (ID 184; Tr. 4709–10). However, at least with respect to some sales to Acme in Philadelphia, respondent appears to have understated actual distribution costs by making some unwarranted assumptions as to the manner of shipment (ID 185).

The fact that Borden, in the course of its business, uses national average figures for distribution costs seems highly persuasive. The object of the exercise is to determine whether Borden was selling at prices which *it knew* (or should have known) to be unprofitable in the short run. The fact that more precise analysis might have shown that Borden's cost of making a particular sale was less than it had been assumed to be seems irrelevant to a determination of predation.

[34] Commissioner Pitofsky adopts this approach as part of the predatory pricing information put forth in his concurring opinion.

137-43). Thus, it appears that neither firm was appreciably more efficient than the other.

These facts form the basis of Judge Hanscom's findings that ReaLemon was sold to Acme and Niagara at "an extraordinarily low price" and that "Borden either failed to consider its cost before agreeing to the low sale prices, or knew that it was selling very close to the cost figures reflected in the data that were then available to it" (ID 193). The effect of these sales is detailed in the record. In 1973, Borden was selling at 10 to 21 cents per bottle more than Golden Crown in the quart size in Eastern and North Central area markets, according to A.C. Nielsen data. The differential was larger at times, and it was clearly necessary for competitors to price substantially below Borden in order to survive in the market.

Thus, if Acme, aided by heavy promotional allowances from Borden, featured ReaLemon at 39 cents per quart, as it did in the fall of 1973, it would be necessary for Golden Crown, in order to maintain the 10-cent differential, [31] to sell to the retailer at *$2.90* per case,[35] an amount far below anybody's reckoning of its average variable cost (ID 196-99). Likewise, Niagara purchased ReaLemon in 1971 and 1972 at a continuous price of $4.40 per case, permitting a retail price of 37-39 cents per quart; even a five cent price differential would require Golden Crown to sell to Niagara at $3.40 per case (ID 199). Even efficiency comparable to Borden in producing lemon juice would not be sufficient to protect competitors from Borden's pricing practices which were made effective by the image-inducted price premium.

The price paid by Golden Crown, the only competitor which made an aggressive attempt to cut into the ReaLemon market share nationally, demonstrates the extent and effects of Borden's power. In the 12 months ending October 31, 1973, for example, Golden Crown posted a net *loss* of roughly $500,000 (CX 147; Tr. 2384-85).[36] ReaLemon Foods' net *income* in 1973, by way of contrast, was $2,087,000, and its annual net income was never less than $1.6 million in any year between 1968 and 1974 (CX 289). When Golden Crown was sold to a Seven-Up subsidiary in 1974, the cash price was $1,239,676, less $934,085 in liabilities assumed by the buyer, or a net cash payment of only $305,591 (RX 665). The contract of sale, as is typical in speculative transactions of this nature, also provided for a five-year earn-out which could add as much as $1,750,000 to the purchase price *(Id.)*. These figures illustrate the financial weakness

[35] Taking into account a retailer mark-up of 20 percent, a figure at the low end of the estimates in the record (ID 196).

[36] In the previous 12 months the company had made a small profit ($17,584), and had recorded a small loss ($6,253) the year before that (CX 147).

of Borden's "strongest" competitor, and the heavy toll Borden was able to inflict on those who challenged its dominance of the processed lemon juice market.

3. *Conclusions of Law*

It can hardly be said that the maintenance of Borden's monopoly power was "economically inevitable." That power itself stemmed from the creation of "an almost imaginary [32] superiority" in the consumer's mind (CX 1, p. 650), which enabled Borden to sell a product which was identical to its competition at a price which exceeded the competition's by as much as 30 percent or more. Its maintenance was the result of a calculated strategy employing geographic price discrimination (with price cuts subsidized in part by continued monopoly pricing elsewhere), and favoring key retailers with discriminatorily low prices and prices that, in the market conditions that existed, would have the likely effect of forcing competitors to sell at a loss.[37] This pattern has its parallels in the decided cases under Section 2 of the Sherman Act. See, *e.g.*, *United States* v. *Grinnell Corp.*, 236 F. Supp. 244, 257 (D.R.I. 1964), *aff'd*, 384 U.S. 563 (1966); *United States* v. *United Shoe Machinery Corp.*, *supra*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

Respondent, in its defense, places principal reliance upon the decision in *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894 (10th Cir. 1975), *rev'g* 367 F. Supp. 258 (N.D. Okla. 1973), *cert. dismissed*, 423 U.S. 802 (1975), and that case merits discussion. There, the Tenth Circuit reversed the district court's ruling that IBM had unlawfully maintained monopoly power in the market for peripheral devices plug compatible with IBM processing units, and various submarkets thereof.[38] The principal means by which IBM was found by the district court to have maintained its monopoly position were the introduction of new peripheral devices at prices substantially lower than the products they replaced, the announcement and implementation of new leasing plans, and IBM's pricing policies with regard to its memory products. [33]

The district court had found that IBM had attained a monopoly position through research and technical innovation, but faced erosion of that position by lower-priced competitors. Accordingly, it developed new products selling at a lower price than the competi-

[37] See *Power Replacements Corp.* v. *Air Preheater Co.*, 356 F. Supp. 872, 897, 898 (E.D. Pa. 1973); cf. *SmithKline Corp.* v. *Eli Lilly & Co.*, *supra*, 427 F. Supp. at 1128.

[38] The court of appeals also reversed the district court's conclusions on the relevant market, but assumed the existence of monopoly power for the purpose of assessing the legality of IBM's conduct.

tion, but still capable of earning a reasonable profit. These acts stimulated concomitant price reductions by IBM's competitors. IBM's new leasing policies also had the effect of a price reduction. Similarly, IBM reduced its prices for memory products to a level below that which it calculated a new entrant would need to charge in order to enter the market. At the same time, it increased prices on other products (central processing units). The district court found that all these acts, although independently lawful, were unlawful when engaged in by a monopolist with the intent and for the purpose of maintaining its monopoly power. It stated:

> It is sufficient that monopoly power is willfully acquired or maintained as distinct from the growth or development in a consequence of a superior product, business acumen or historic accident.

367 F. Supp. at 341. The Tenth Circuit regarded the district court's interpretation of the law as "extremely narrow," and mentioned two additional factors which must be considered:

> [W]hether or not the acts are ordinary business practices typical of those used in a competitive market, and secondly whether the acts constitute the *use* of monopoly power.

510 F.2d at 925–26 (emphasis in original). The court of appeals further noted:

> The trial court did not find nor did it hold that the acts of IBM found to be illegal were derived from its power in the market or its size, nor were they acts which could only have been performed by one with the requisite power. The "acts" found by the trial court to be illegal were ordinary marketing methods available to all in the market.

[34] *Id.* at 926. This, in our view, spells out the principal difference between *Telex* and the instant case. For here, the acts of Borden which we hold to be illegal were derived from and, indeed, made possible by, its power in the market. Moreover, the record indicates that in this market these "acts" could only have been performed by one with Borden's market power, and thus were not "ordinary marketing methods available to all in the market."

In the *Telex* case it appears that IBM attained a dominant position through superior technical attainments, and when competition arose it lowered prices, within a reasonable range, to combat its competition. There is no indication that its strategy of price reductions guaranteed success. Rather, in a market of sophisticated buyers and sellers IBM would be forced, in order to hold onto its market share, to engage in ordinary price and quality competition, and rely upon its ability to produce a product which was satisfactory to buyers and

upon its reputation for quality and reliability. Furthermore, there was no evidence of price discrimination by IBM.

Borden, on the other hand, had the enormous market advantage conferred by the ReaLemon trademark and its magnetic pull on the consumer. In order to preserve its market dominance it manipulated the price premium which that trademark afforded, and engaged in price discrimination. ReaLemon's juice was indistinguishable in its characteristics from competing processed lemon juices; only the market power inherent in the ReaLemon trademark enabled Borden to manipulate price differentials and discriminate among customers in different areas to maximize its advantage over other producers. Neither Golden Crown, nor Seneca, nor Vita-Pakt, nor even such well-known brands as Sunkist or Minute Maid were able to engage in the kinds of pricing practices engaged in by Borden. Clearly these methods were not available to all in the market, and clearly they were directly attributable to Borden's market power. Thus, we conclude that the *Telex* case is distinguishable from the present case, and offers no support for Borden's position. [35]

Professor Scherer has written:

> An image advantage, permitting the maintenance of a price premium, is conceptually analogous to a unit cost advantage. Either enhances the dominant firm's incentive to cut prices temporarily to exclude less-favored rivals. What society obtains following successful image-induced exclusionary pricing is not the freeing of resources that can be employed more effectively elsewhere, but rather, higher prices and profits accompanied by increased consumption of the "premium" product . . . . I find it hard to avoid a value judgment that temporary price cutting to eliminate producers handicapped only by an inferior brand image is socially undesirable.

Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869, 889 (1976). Dr. Scherer's analysis applies to this case.

Whether or not Borden sold below short-run marginal cost, it is incontrovertible that its pricing practices, including geographic discrimination which was not cost-justified and pricing very close to average variable cost, were exclusionary in intent and effect.[38*] To

[38*] We agree with Commissioner Pitofsky that a strategic pricing rule should not require price reductions to be made uniformly across geographic markets without regard to the monopolist's different costs in different markets and the competitive effects of its strategic pricing policies. Moreover, price discrimination among different geographic markets does not of itself constitute a violation of Section 2 of the Sherman Act or Section 5 of the FTC Act. We have found that Borden engaged in geographic price discrimination which injured competition and which was not attributable to lower costs in any market. Our order likewise only prohibits price discrimination which is not cost justified and the "effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors. . . ."

We do not agree with Commissioner Clanton's position that Borden can be condemned as a monopolist for selling below average variable cost (which cost is construed to include advertising) to two customers in two cities, but not for manipulating prices in a discriminatory and exclusionary fashion nationwide. Borden's strategy was aimed at more than merely cementing its monopoly in Buffalo and Philadelphia.

the extent that Borden priced below average total cost with the evident intent to exclude Golden Crown, its practices run afoul of Posner's rule. See pages 30–31 *supra.* In any event, the effect of Borden's spurious product differentiation, making it necessary for competitors to sell considerably below ReaLemon, created a [36] circumstance where even prices above marginal cost could, as the record indicates (ID 194–200), be predatory in the sense that even equally efficient competitors could be driven from the market.[39] See R. Posner, *supra,* at 188.

We find that Borden's marketplace advantage is not attributable to a superior product. Nor has Borden been shown to be more efficient than its competitors; if it is, that fact is not reflected in its prices. Nor has Borden contributed anything in the way of innovation since Irvin Swartzberg first developed ReaLemon. ReaLemon is the same product, and is made the same way it has been for many years. ReaLemon is distinguished from its competitors only by the strength of its trademark.

Borden sought aggressively to preserve its monopoly share of the processed lemon juice market, and even to increase it (*e.g.,* CX 3, pp. 790–91; CX 4, pp. 861, 864). It tolerated only fringe competition, and manipulated its price premium to prevent its competitors from growing into serious threats to its monopoly position.[40] We hold that Borden's continued domination of the market was attributable to a design to maintain a monopoly share of the market, that it was not "economically inevitable," and that, as such it violated Section 5.[40a]*

[39] Cf. *Knutson* v. *Daily Review, Inc.,* 548 F.2d 795, 814 n. 21 (9th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977) (dictum); *SmithKline Corp.* v. *Eli Lilly & Co., supra,* 427 F. Supp. 1089, 1128 (E.D. Pa. 1976), *aff'd,* 1978–1 Trade Cas. ¶ 62,007 (3d Cir. April 3, 1978), petition for cert. filed, 47 U.S.L.W. 3009 (U.S. June 30, 1978) (No. 77–1869); *Quaker Oats Co.,* 66 F.T.C. 1131, 1193–94 (1964) (dictum). We do not suggest, however, a rule which permits a monopolist to price so as to exclude all but equally or more efficient rivals. There must be some room for new entrants which must incur substantial start-up costs (perhaps including intensive advertising) and who cannot be expected to commence production at optimal scale. Moreover, even when not producing at optimal scale, such new entrants may provide significant consumer benefits by selling at prices lower than those offered by a more efficient monopolist which is able to exact a higher price for what may be the identical product because of its trademark.

[40] Respondent expended considerable effort, and consumed over 800 pages of trial transcript, attempting to prove that Golden Crown sold an adulterated product, ostensibly for the purpose of impeaching the testimony of one Golden Crown witness called by complaint counsel. This protracted exercise elicited almost no material evidence in this case (whatever effect it may have had on private litigation between Borden and Golden Crown). We find that that witness' testimony as to general facts about the industry was corroborated by other industry witnesses, and that his estimate of Golden Crown's costs was fairly consistent with Borden's own estimates (ID 195). Thus, we find Borden's contention that "the entirety of this proceeding has been permeated" by the testimony of a perjurer (RAB 47) to be a gross exaggeration. In particular, respondent's statement that "It is simply incredible that the Commission's staff and the ALJ are continuing to give aid and comfort to Hansfield and his fellow perjurers by continuing the prosecution of this complaint" (RAB 52) goes beyond the bounds of responsible advocacy.

[40a] [37a] In its reply brief in support of its appeal to the Commission, Borden attached "Exhibit A," which consists of two charts prepared by Borden or its counsel from sales statistics compiled by A.C. Nielsen, Inc., as explained in an accompanying affidavit. Complaint counsel moved to strike Exhibit A on the ground that the record had been closed nearly one year earlier. Complaint counsel's motion also apparently questioned the reliability of the data reflected in Exhibit A.

Respondent replied to complaint counsel's motion with a counter motion to lodge Exhibit A in the record, to

(Continued)

III. REMEDY

[37] Having found that Borden possessed and unlawfully maintained monopoly power in the processed lemon juice market in violation of Section 5, we must address the question of the remedy to be imposed. As Judge Hanscom noted, citing *United States v. Grinnell Corp., supra,* 384 U.S. at 577:

> In a "monopolization" case, adequate relief must put an end to the monopoly position, and break up or render impotent the monopoly power found to have been preserved and maintained in violation of law.

ID, pp. 162–63. The objective is to take the measures necessary to "pry open to competition a market that has been closed . . . ." *International Salt Co.* v. *United States,* 332 U.S. 392, 401 (1947). As in all Section 5 cases, the Commission has wide discretion in its choice of a remedy, so long as the remedy selected has a reasonable relation to the violation found. *FTC* v. *National Lead Co.,* 352 U.S. 419, 428–29 (1957); *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 611, 613 (1946).

Judge Hanscom's order contained provisions barring respondent from using certain pricing practices, and also provided for compulsory licensing of the "ReaLemon" name and label design for a ten-year period. With respect to pricing, Judge Hanscom ordered respondent, in connection with the production, marketing and sale of processed lemon juice, to cease and desist from:

> (1) Granting price reductions, directly or indirectly, which result in different net prices among Borden's ReaLemon customers competing in the same geographic area, the effect of which is to hinder, restrain or eliminate competition between respondent

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which complaint counsel responded. Respondent contended that Exhibit A contained probative evidence relevant to the question whether Borden possessed monopoly power, whether the ReaLemon trademark constituted a barrier to entry, and whether the relief ordered by the ALJ was appropriate.

Exhibit A consists of data compiled from Nielsen reports reflecting consumer sales of "selected lemon juices" (ReaLemon, Minute Maid, Golden Crown, Seneca and "all other lemon") for four two-month periods (April/May, June/July, August/September and October/November) in 1976, (the record was closed on February 23, 1976), on a dollar and gallonage basis. The apparent purpose of Exhibit A is to show that Minute Maid was able to enter the processed lemon juice market, and to gain a substantial share of that market quickly, while ReaLemon suffered a concomitant drop in market share. (Other producers' shares also fell: Golden Crown from 8.5% to 7.1%; Seneca from 1.8% to 1.3%; and "all others" from 8.2 to 8.0%.)

As a general rule, the presentation of evidence after a time when it can be challenged by opposing parties and considered by the administrative law judge is strongly disfavored. The Commission has, however, in its discretion, decided to lodge the exhibit in the record.

Nevertheless, we cannot conclude that the evidence in Exhibit A, based on a two-year old "snapshot" of the market, negates the conclusion that Borden possessed monopoly power in the processed lemon juice market, a conclusion drawn not only from market share, but from a variety of other factors detailed above. Nor does it affect the conclusion that Borden engaged in a variety of exclusionary practices to maintain that power unlawfully. In the first place, such post-trial evidence is highly unreliable, inasmuch as a respondent may cease exclusionary practices during the pendency of administrative proceedings. Cf. *FTC* v. *Consolidated Foods Corp.,* 380 U.S. 592, 598 (1965); *United States* v. *Continental Can Co.,* 378 U.S. 441, 463 (1964). The evidence amassed at trial clearly establishes that Borden unlawfully monopolized the processed lemon juice market for many years prior to this proceeding.

Borden and its competitors in the production, marketing and sale of processed lemon juice;

(2) Selling ReaLemon lemon juice below its cost or at unreasonably low prices, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice; [38]

(3) Granting promotional allowances or payments of any kind for customers' promotional services, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice.

These provisions are intended to put a halt to the pricing practices described in Section II of this opinion. Although the ALJ did not find that "ReaLemon" was sold below cost, nor do we, we agree that an injunction against such conduct is "reasonably related" to the violation found, and is appropriate relief in the nature of "fencing in." *FTC* v. *National Lead Co., supra,* 352 U.S. at 431.

Subparagraph (3) of the ALJ's order, which is quoted above, deals with promotional allowances which have an adverse effect on competition. However, promotional allowances were the medium by which all the acts and practices used by Borden in its monopolistic scheme, including price discrimination within a single geographic area and selling at unreasonably low prices,[41] were accomplished. Those acts and practices are specifically forbidden in subparagraphs (1) and (2), yet none of the subparagraphs refers specifically to the geographic price discrimination which was the primary means used by Borden to preserve its monopoly position. Thus, we will revise subparagraph (1) to prohibit any price discrimination, not justified by cost differentials, that adversely affects competition. [39]

A majority of the Commission is of the opinion that a pricing order, as set forth above, should be sufficient to prevent Borden from unreasonably excluding competition in the processed lemon juice market.[42] While an order requiring licensing or suspension of a trademark may be ordered as a means of dissipating illegally used or acquired monopoly power, we are mindful that the remedy is a severe one, and should be imposed only where less drastic means appear unlikely to suffice *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946); *FTC* v. *Royal Milling Co.,* 288 U.S. 212 (1933).

In the case before us it seems clear that there have been and remain a significant number of strong competitors willing to enter

[41] Whether a price is "unreasonably low" must be determined by reference to Borden's own costs, its awareness of its competitors' costs, historic price differentials, and competitive conditions in the market.

[42] While Chairman Pertschuk subscribes to the majority's order, he feels that trademark relief should have been ordered as well. His views are set forth in his separate opinion.

the market for processed lemon juice and compete with ReaLemon, in some cases by selling at prices substantially below those charged by Borden. Most barriers to entry, *e.g.,* capital costs, absolute costs, and scale economies, are insignificant. What has deterred significant entry has been Borden's practice of selectively cutting prices at different times and in different geographic markets, to prevent a competitor from gaining more than a token share of particular markets in which a challenge has been made. While the short-run consequences of such actions to the consumers affected may be positive in terms of lower prices, the longer-run consequences are almost certain to be ill, because as soon as the threat of entry vanishes, and as future potential entrants come to recognize the financial disaster that will attend efforts to enter, Borden is free to raise prices back to monopolistic levels and consumers will have lost a meaningful alternative to the monopoly brand.

Under these circumstances, we believe that an order that simply prohibits Borden from pricing to exclude or minimize new entry should be sufficient to dissipate its unlawfully maintained monopoly position, which is the only permissible object of relief in this case. Such an order will allow new or toehold entrants to penetrate markets without fear of the sort of retaliation by Borden that would force such entrants to sell at a sustained loss. Over time, the presence of new brands in the market should provide the competitive alternative that consumers need to determine whether they prefer Borden, at its price, or what seem to be substantially identical alternatives, at substantially lower prices. [40]

Although it may be argued that the pricing order entered herein suffers from the defect of imprecision, it should be noted that this is not an objection that respondent has raised. Perhaps that is because it recognizes, properly, that some imprecision is inevitable in any order of this sort, or perhaps it feels that as a result of such imprecision any order entered will rest lightly upon its shoulders. The latter result, however, is not necessarily an inappropriate one. The purpose of our order, again, is only to prevent the use of short term price changes to exclude meaningful competition, and not to regulate in minute detail the prices or market shares of Borden. As a monopolist it is obliged to refrain from the sort of retaliatory price-cutting that would be allowed a sub-monopolist. Should its monopoly dissolve, however, it is desirable that an order not deter Borden from vigorous price competition, or from enjoyment of the fruits of the trademark it has developed.

In sum, given the competitive climate in the processed lemon juice market, we are not persuaded that a restriction on trademark rights

is needed to curb the unlawfully maintained monopoly. Prohibition of abuse of the trademark that led to this case should be sufficient to encourage the entry necessary to result in a competitive market.[43]

An appropriate order is appended.[44]

Separate Opinion of Chairman Pertschuk on the Issue of Relief

The power inherent in the ReaLemon trademark, and the price premium it permitted, are the root of Borden's monopoly power. Therefore, as Judge Hanscom recognized:

> Enjoining the acts and practices by which respondent knowingly preserved and maintained its monopoly position, and prohibition of a repetition thereof, will not constitute an adequate remedy in this proceeding and end the monopoly power possessed by ReaLemon Foods in the processed lemon juice industry . . . . For competition to enter the processed lemon juice industry, the barrier to entry which inheres in the ReaLemon trademark must be eliminated.

ID pp. 163-64. I am not optimistic that the conduct order we are issuing, standing alone, will be sufficient to end Borden's unlawful monopoly hold on the processed lemon juice market.

Courts and the Commission have consistently recognized that in antitrust cases relief should not be strictly limited to preventing a repetition of specific unlawful practices, because the aim is to undo the harm those practices have caused and to permit competition to flourish unimpaired. This is particularly true in monopolization cases, where acts and practices may be lawful in and of themselves, but serve as means for the acquisition and maintenance of monopoly power. As the Supreme Court stated in *Schine Chain Theatres, Inc.*, v. *United States*, 334 U.S. 110, 128 (1948): [2]

> In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors.

Framing relief that will facilitate effective competition in the

[43] Indeed, if Borden's post-hearing assertions are to be believed, the desired consequences may already have been produced merely by the institution of this lawsuit. On the basis of the Nielsen market research surveys, Borden alleges that subsequent to the complaint, Minute Maid has made substantial inroads into its position in various markets. Such evidence suggests that dissipation of the monopoly may not require drastic remedial steps. Should we be wrong in our assessment of the evidence, of course, it remains open for the Commission to reopen the record to consider entry of the sort of trademark relief that presently appears unnecessary.

[44] Respondent's "suggestion" that former Commissioner Collier "consider his further participation in this case" is treated as a motion to disqualify and dismissed as moot.

market is the key consideration. See, *e.g., Ford Motor Co.* v. *United States,* 405 U.S. 562, 573 (1972); *United States* v. *E.I. duPont de Nemours & Co.* 366 U.S. 316, 326 (1961); *International Salt Co.* v. *United States, supra,* 332 U.S. at 401 (1947); *United States* v. *United Shoe Machinery Corp., supra,* 110 F. Supp. at 346–47.

The practices utilized by Borden to maintain its monopoly position in the processed lemon juice market were keyed to ReaLemon's substantial price premium, itself the product of a highly effective strategy of product differentiation which created "an almost imaginary superiority . . . in the mind of the consumer" (CX 1, p. 650). The Commission's order and Commissioner Pitofsky's concurring opinion both attempt to formulate remedies which will prohibit Borden from manipulating its pricing so as to frustrate emerging competition. The imprecision of these approaches illustrates the elusiveness of a truly effective conduct remedy for a violation which has a prominent structural component, *i.e.,* the potent trademark. Thus, I feel that a structural remedy is required.[1]

In urging compulsory licensing of the ReaLemon trademark, complaint counsel attempted to draw an analogy to compulsory patent licensing, which is an accepted [3] antitrust remedy. See, *e.g., United States* v. *National Lead Co.,* 332 U.S. 319 (1947); *American Cyanamid Co.,* 63 F.T.C. 1747 (1963), *vacated and remanded on other grounds,* 363 F.2d 757 (6th Cir. 1966). Patent licensing has been ordered to dissipate monopoly power even when the patent has not been misused or implicated in the violation. *United States* v. *United Shoe Machinery Corp., supra,* 110 F. Supp. at 351.

Respondent and the *amici curiae* point out that there are important differences between patents and trademarks. Patents are intended to create monopolies, limited in time, as a stimulus to innovation. The purpose of a trademark is not to create a monopoly, but to designate the source of a product's origin. *Hanover Star Milling Co.* v. *Metcalf,* 240 U.S. 403, 412 (1916). It functions not merely to serve the interest of the seller, but to protect consumers from being deceived as to the source of a product. *Smith* v. *Chanel, Inc.,* 402 F.2d 562, 566 (9th Cir. 1968).

Notwithstanding their general function, which respondent represents to be the antithesis of monopoly, there are cases in which trademarks can serve as instruments of monopoly, and this is such a case. The ReaLemon trademark serves not merely as an identifier of the lemon juice sold under that name, but provides respondent with

[1] Divestiture of stock or physical assets is a common form of antitrust relief that is often appropriate in monopolization cases. *E.g., Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911). In this case, however, the relative ease of producing processed lemon juice (ID 9 and p. 166) makes such relief unnecessary.

a mechanism to control prices and entry in the processed lemon juice market, and acts as a formidable barrier to entry.

Professor Scherer has argued persuasively in favor of compulsory trademark licensing as a means of curing the dislocations caused by monopoly. Scherer, *The Posnerian Harvest: Separating Wheat from Chaff,* 86 Yale L.J. 974 (1977) (book review). Scherer aptly states the problem:

> First, no amount of semantic waffling, by Posner or anyone else, can paper over the fact that the possession of a well-received brand image is a form of monopoly power. It permits the firm to elevate its price over its own long-run costs, perhaps by a substantial margin. Second, it seems to me that, at least in the consumer goods industries, image advantages confer a quantitatively important form of monopoly power — perhaps the most important . . . . Third, one may well conclude that the problem is already sufficiently serious that something should be done about it. [4]

Id. at 998–99. The remedy prescribed by Scherer is compulsory trademark licensing. *Id.* at 999–1000.

Respondent contends that the Commission lacks the power to order licensing of a trademark. While the patent licensing analogy advanced by complaint counsel may not be entirely apposite, it does illustrate the range of remedies available to the Commission to restore effective competition to the market. The power of the Commission to implement effective relief is not extinguished by the fact that a trademark is involved. As one commentator has observed:

> When, however, the problem arises of awarding antitrust relief necessary to dissipate the effects of a monopoly, that question [whether a potent trademark is the creature or the cause of a monopoly] becomes academic, because trade-mark relief can be as effective to that end as other types of relief.

Timberg, *Trade-Marks, Monopoly and the Restraint of Competition,* 14 Law & Contemp. Prob. 323, 344 (1949).

This is not to say that compulsory trademark licensing is without problems of its own. Scherer has assessed the benefits and costs:

> The benefit would presumably (although in the present state of knowledge, not demonstrably) be lower prices and reduced outlays on promotion. The costs would be some risk (in my judgment, slight) of weakened quality control, some additional inspection costs to ensure that quality standards are met, a possible loss of scale economies that would be weighed in advance before trademark licensing were decreed, an added information-processing burden on consumers, and a certain amount of violence to traditional property rights. I believe that in numerous cases the social benefits would outweigh the costs.

[5] Scherer, *supra,* 86 Yale L.J. at 999.[2]

[2] I do not agree with Scherer that the remedy does violence to property rights, since it would be applied only in

(Continued)

The range of trademark remedies is not limited to compulsory licensing. The Commission might also enjoin the use of a trademark for a fixed period. Such an order in this case would strip Borden of the power over price and entry it has been shown to possess, and would permit other firms to compete with Borden on a reasonably equal footing. At the same time, it would not be confiscatory, contribute to consumer confusion, nor enmesh the Commission in questions of quality control and reasonableness of royalties.

The same type of order was issued in *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972), a merger case decided under Section 7 of the Clayton Act.[3] Ford's acquisition of Autolite, a manufacturer of spark plugs, was held unlawful because it eliminated potential competition and also foreclosed Ford as a purchaser of about 10 percent of industry output. In addition to ordering divestiture of the Autolite spark plug plant, the district court issued a number of injunctions, including one barring Ford from using the Ford tradename on spark plugs for a five year period. The latter provision was justified on the ground that it was necessary to break the so-called "OE tie," which is the tendency of consumers to ask for, and for mechanics to install, the original equipment brand when replacing spark plugs. The court held that permitting Ford to use its own name on OE plugs (even those purchased from the divested Autolite) would make it difficult for a divested Autolite or other competitors to compete in the replacement market. [6]

The Supreme Court upheld the district court's order in full, including the injunction against use of the Ford name. With respect to that provision, the Court explained:

> Ford argues that any prohibition against the use of its name is permissible only where the name deceives or confuses the public. But this is not an unfair competition case. The temporary ban on the use of the Ford name is designed to restore the preacquisition competitive structure of the market.

405 U.S. at 576. (footnote omitted).

If anything, the instant case is even stronger than *Ford* with respect to the appropriateness of enjoining the use of the trademark.

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cases where the trademark, a creature of the law, has ceased to perform its traditional function and has taken on the character of an instrument of monopoly power. The information burden on consumers could be more significant, since it could be argued that a profusion of "ReaLemons" on the supermarket shelf could lead to consumer confusion. However, to the extent that consumers perceive ReaLemon to be objectively superior to other brands of processed lemon juice, it appears that there is already considerable confusion extant. The quality control and inspection problems averted to by Scherer are not insoluble, but do represent issues which must be carefully considered in applying a licensing remedy.

[3] Similar relief was ordered in *United States* v. *General Electric Co.*, 115 F. Supp. 835, 858–59 (D.N.J. 1953), the electric lamp cartel case, where General Electric was enjoined from using the "Mazda" trademark in connection with more than one percent of its lamp sales in any year.

In *Ford,* the OE tie was incidental to the violation. The Court found, however, that elimination of the OE tie was necessary to the restoration of competition, and that measures short of enjoining the use of the Ford name would not suffice. Here, the "ReaLemon" trademark and the price premium associated with it are part and parcel of the violation found.

Deception cases have recognized the Commission's power to order firms to cease and desist from using deceptive trade names. *E.g., FTC* v. *Algoma Lumber Co.,* 291 U.S. 67 (1934). In such cases, the Supreme Court has directed that the Commission not prohibit the use of a trade name *unless* less drastic means will not accomplish the same result. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946); *FTC* v. *Royal Milling Co.,* 288 U.S. 212 (1933). Here, "less drastic" means may not be effective in fostering competition in the processed lemon juice market, and a limited injunction against use by Borden of the "ReaLemon" trademark may be necessary in the public interest. See McCarthy, *Compulsory Licensing of Trademark: Remedy or Penalty?,* 67 Trademark Rep. 197, 242 (1977).[4]

[7] Thus, I would, in addition to the pricing order issued by the Commission (in which I join), order some form of trademark relief, and would order additional briefing by the parties on the issue if necessary.

Concurring Opinion of Commissioner Clanton

I concur in the Commission's determination that processed lemon juice sold in the United States is a relevant market and that Borden possessed monopoly power in that market. However, I support Commissioner Pitofsky's treatment of the geographic price discrimination charge and I share his belief that inquiry into a monopolist's alleged exclusionary intent is of limited utility in identifying predatory behavior.

I also concur in Commissioner Pitofsky's application of a standard of reasonableness using cost-based considerations to delineate with some degree of precision the bounds of permissible pricing for a monopolist who wishes to respond to competitive forces in the marketplace. A rule which ordains a passive role for the monopolist under these conditions sacrifices both efficiency and consumer

[4] Cf. *United States* v. *Wallace & Tiernan Co.,* 1954 Trade Cas. ¶67,828 (D.R.I. 1954); *United States* v. *A.B. Dick Co.,* 1948-49 Trade Cas. ¶62,233 (N.D. Ohio 1948); *United States* v. *American Optical Co.,* 1948-49 Trade Cas. ¶62,308 (D. Mass. 1948); and *United States* v. *Gamewell Co.,* 1948-49 Trade Cas. ¶62,236 (S.D.N.Y. 1948), (consent decrees enjoining defendants from interfering with the use by others of their trademarks (with certain exceptions)). In addition, the *A.B. Dick* and *Wallace & Teirnan* orders required dedication to the public of various trademarks.

welfare and is contrary to the overriding goal of the antitrust laws to protect competition, not competitors.[1]

[2] As Commissioner Pitofsky points out, the courts have generally adopted the so-called Areeda-Turner rule[2] in recent cases and have applied a marginal or average variable cost ("AVC") standard in adjudicating predatory pricing allegations. Moreover, where barriers to entry are "extremely high," the courts have indicated a willingness to find monopolization if the monopolist is pricing below its short-run, profit maximizing price.[3] In this regard, Commissioner Pitofsky correctly characterizes Borden's ability to charge a higher price for its product due to brand allegiance as a barrier to entry which must be overcome by a new entrant just like any other start-up cost. But while I agree with my colleague that a predatory pricing rule must take account of the nature of the entry barriers present in a market, I question whether application of a rule other than average variable cost is appropriate or necessary in this case.

In particular, I have trouble with the notion that, where a pronounced consumer preference exists, a monopolist should be precluded from pricing below full cost until the preference disappears (or until the monopoly share is dissipated). Such a rule, in my view, threatens to prolong unduly the interval over which consumers must pay higher prices and during which less efficient firms are sheltered from fair competition. Although I agree with Commissioner Pitofsky and the courts that in appropriate circumstances new entrants must be afforded the opportunity to overcome high entry barriers, I am unwilling to compel a dominant firm to price at a full-cost level for the indefinite period that may be required to fully neutralize a pronounced consumer preference.[4]

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[1] *See Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3755 (May 30, 1978); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1358–59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *cf. Telex Corp.* v. *IBM*, 510 F.2d 894, 927 (10th Cir. 1975), *cert. denied*, 423 U.S. 802 (1975).

[2] III P. Areeda & D. Turner, *Antitrust Law* 148–194 (1978) (hereinafter "Treatise").

[3] *International Air Indus., Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 724–25 n. 31 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976), ("The lower the barriers to entry in a market, the closer to marginal cost a monopolist would have to set its price in order for a plaintiff to prevail as a matter of law, for we see no social utility in insuring the survival of inefficient firms where a new entry is possible."); *ILC Peripherals Leasing Corp.* v. *IBM*, 1978-2 Trade Cas. ¶62,177 (N.D. Cal. 1978); *but cf. Hanson, supra* at 1358 n. 5. ("There is some question, however, whether pricing below a profit maximizing point which is still above marginal and average variable costs should be considered predatory . . . .")

[4] Professor Williamson suggests that twelve to eighteen months is ordinarily sufficient to allow a new entrant to realize cost economies and establish a market identity, noting that a longer period of protection will weaken the incentives of new entrants to quickly achieve cost parity with the dominant firm. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284, 296 (1977). It should be noted that in this case Borden did not respond immediately to Golden Crown's entry and growth. Borden seemed to recognize its peril in 1970, when it noted in its 1971 Marketing Plan that competition was making "serious inroads" and that Golden Crown, Seneca and Tropic Fresh were "causing the most difficulty." (CX 1, pp. 640, 645) Yet, as Commissioner Pitofsky correctly observes (at 16, n.), the timing of Borden's response reflects a degree of restraint on their part. Indeed, Borden's price response to those inroads did not reach its peak until 1973, when its national share had fallen by 8 percentage points and Golden Crown's had risen by 13 percentage points during the preceding three-year period. (CX 4, pp. 853, 881–83)

[3] Apart from my differences with Commissioner Pitofsky over the duration of proposed restrictions on a monopolist's pricing practices, I further believe that it is unnecessary to devise a new rule for the purpose of determining whether Borden monopolized the processed lemon juice market. The Areeda-Turner rule would exclude from variable costs only the following items:

> (1) capital costs (interest on debt and opportunity cost of share capital) attributable to investment in land, plant and equipment; (2) property and other taxes unaffected by output; and (3) depreciation on plant (the life of which is little affected by use). (Footnote omitted) (*Treatise* at 173)

Overhead items as well as advertising and promotional expenses would be included because portions of these expenditures are within the monopolist's control[5] and because it is impossible to identify advertising costs which represent a capital investment in goodwill and overhead expenses which cannot be eliminated in the shortrun.[6] While such an approach obviously [4] includes some fixed costs, I agree with Professors Areeda and Turner that it is better to sacrifice some measure of accuracy for a rule which has greater clarity and which, in its application, does not err in favor of the monopolist.

Utilizing the Areeda-Turner definition of average variable cost, it is unnecessary to include any portion of overhead expense in order to discover pricing below AVC in this case.[7] Adding only advertising costs, other promotional expenses,[8] and all selling expenses for 1973 to those costs conceded by respondent to be variable in nature produces an AVC of $4.10 for ReaLemon shipped to Buffalo and an AVC of $4.18 for product shipped to Philadelphia.[9] Yet in December of 1973, Acme Markets, Philadelphia's price leader and largest retail chain with 20–28% of the market, purchased 1,815 cases of ReaLemon (32 oz. bottles) at a net price of $4.05 per case. (IDF 147, 154, 190) This enabled Acme to sell ReaLemon at $.39 per quart in an area described in Borden's 1973 Marketing Plan as a highly

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[5] *Treatise* at 174. I am unable to adopt the majority's conclusion that Borden's advertising was unrelated to its output in the shortrun. A review of Borden's marketing plans indicates that Borden itself recognized the importance of the advertising/sales relationship. (CX 2, p. 667; CX 3, p. 772; CX 4, p. 848)

[6] *Treatise* at 173–74. Areeda and Turner have apparently revised their views on the treatment of advertising expenses since the appearance of their 1975 article. Whereas they initially suggested examination of a company's books to determine whether advertising was classified as a current expense attributable to current sales, they now take the view that variable cost includes advertising and other promotional expenditures irrespective of a monopolist's accounting system. *Compare* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 728 (1975) *with* III *Treatise* at 191.

[7] Inclusion of manufacturing and administrative overhead in the calculation of average variable cost might reveal predatory pricing in other cities. (CX 293, Complaint Counsel's Proposed Finding No. 158) Unfortunately, the record does not define overhead with the precision needed to isolate those items considered as fixed costs by Areeda and Turner.

[8] CX 293. Other promotional expenses include promotional materials and similar items. (Tr. 4451)

[9] CX 293, RX 654. Respondent's estimates of actual distribution costs have been used, as well as packing costs for Comstock.

competitive market which ranked third in sales of ReaLemon and contributed 5.5% of nationwide revenue. (CX 3, p. 838) Similarly, Borden sold 2,000 cases of ReaLemon quarts in December 1973 at a net price of $4.05 per case to Niagara Frontier Services, which owns or franchises Tops Markets, the largest volume supermarket in the Buffalo area. (IDF 161, CX 212) Buffalo was, like Philadelphia, an area in which Golden Crown had made substantial inroads at Borden's expense. (IDF 165)[10] Since these transactions can hardly be characterized as inadvertent or insignificant, I am compelled to conclude that Borden illegally acted to maintain its monopoly power and thereby violated Section 5. [5]

A finding of monopolization necessarily compels consideration of whether or not structural remedies are needed to restore competition to the relevant market. However, the potential for consumer confusion associated with various trademark-related remedies cautions against imposing a structural remedy of that nature where there is a reasonable likelihood that market forces, unfettered by predation, will return the market to a competitive status. In the context of the record of this proceeding, I am not persuaded that either compulsory trademark licensing or an injunction against use of the ReaLemon mark is necessary to dissipate Borden's monopoly power. The record here reveals quite clearly that Golden Crown and others made substantial incursions upon Borden's market share up until the deep price cuts of 1973 and 1974. It seems safe to assume that these competitive forces will continue with renewed vigor if Borden is free to price its product no lower than its average variable cost as defined pursuant to the Areeda-Turner rule.[11] Additionally, it is important to reiterate that the record does not permit a definitive determination as to whether Borden's predation was more pervasive than the Philadelphia and Buffalo sales described above.

In view of these circumstances, I would order Borden to cease and desist only from selling ReaLemon lemon juice below its average variable cost, where the effect of such action is to hinder, restrain or eliminate competition between Borden and its competitors. Such adverse effects would be presumed so long as Borden retains monopoly or near monopoly power. I see no need for an additional "fencing-in" provision with respect to promotional allowances since any calculation of price would necessarily be net of such allowances.

[10] On November 20, 1973, ReaLemon National Sales Manager, Harold Saving, reported the gains made by Golden Crown earlier in the year in Buffalo and expressed confidence that Borden's holiday promotion would reverse this trend and substantially slow Golden Crown's growth. (CX 81, p. 7440)

[11] In reaching this conclusion I give no weight to respondent's eleventh hour attempt to introduce new market share data (*see* Appendix A of respondent's Reply Brief) which has not been subject to cross-examination by complaint counsel and review by the administrative law judge.

CONCURRING OPINION OF COMMISSIONER PITOFSKY

I agree that Borden illegally maintained a monopoly position in the sale of reconstituted lemon juice in violation of Section 5 of the Federal Trade Commission Act, and I join Parts I and IIA of the majority opinion regarding the definition of relevant markets and the existence of Borden's monopoly power. On the "monopolizing," or conduct, aspect of the case, however, I believe a much narrower ground of decision than is spelled out in the majority opinion should be emphasized. Accordingly, I separately set forth my views on the issue of Borden's maintenance of monopoly power.

Reliance on this narrower ground of decision influences the determination of appropriate remedy and the order that should be imposed to correct Borden's violation.

I. MAINTENANCE OF MONOPOLY POWER

A. *Predatory Intent and Exclusionary Effect.* The question of defining appropriate limits on permissible business behavior by a monopolist is perplexing. On the one hand, monopoly power and the market dislocations it generates (in terms of higher prices, lower output, and the potential for diminished efficiency) is abhorrent to an effective competitive system. *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 427 (2d Cir. 1945); 2 P. Areeda & D. Turner, *Antitrust Law,* ¶403, at 271–272 (1978); L. Sullivan, *Antitrust,* 25–26 (1977). Reflecting these policy concerns, there is sweeping language in several landmark Sherman Act Section 2 opinions suggesting that any willful business behavior which has an exclusionary effect on existing or [2] potential rivals of the monopolist will satisfy the conduct element of Section 2. In *United States* v. *Grinnell Corp.,* 384 U.S. 563, 570–71 (1966), the Supreme Court stated that a violation of Section 2 has but two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. . . ." *Id.* citing, *United States* v. *duPont & Co.,* 351 U.S. 377, 391 (1956). Similarly, in *Alcoa, supra,* the court drew the distinction between a monopolist who had "achieved monopoly" and one who had monopoly "thrust upon it," 148 F.2d at 429, reasoning from the premise that "no monopolist monopolizes unconscious of what he is doing." *Id.* at 432. The court concluded that Alcoa's embracing of each new business opportunity, though honestly industrial, clearly excluded competitors. *Id.* at 431. See also, *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 340–343 (1953).

On the other hand, it is fundamental to Section 2 enforcement that

a monopolist will not be penalized if its success derives solely from its superior skill, foresight and industry. Extraordinary commercial success was distinguished from oppressive or unfair conduct leading to monopoly in the legislative debates attending passage of the Act and only the latter was to be proscribed by Section 2. *United States* v. *duPont & Co., supra,* 351 U.S. 378, 390 n. 15. The distinction has been maintained consistently by the courts. *E.g., United States* v. *Grinnell Corp., supra,* 384 U.S. 563, 570–71 ("willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."); *Alcoa, supra,* 148 F.2d 416, 430.

When we try to adopt as economic policy the implications of some of the more sweeping language found in *Alcoa, United Shoe,* and *Grinnell,* language which incidentally was almost certainly not necessary to the results in those cases, we find that these eloquent statements are difficult to apply sensibly and consistently. For example, emphasis on the word "willful" in *Grinnell* could suggest that intent is the critical element in determining whether conduct by a monopolist is legal. But when one tries to analyze "intent" in the context of monopoly litigation, it is immediately apparent that intent is an ambiguous indicator. What is the intent of a monopolist when responding to challenge by existing or new competition? Obviously, the monopolist wants to make as many profitable sales as possible, including sales that its new challengers seek, and to retain and [3] expand its market share. It may be aware that if it succeeds fully in repelling the competitive challenge of new rivals, those rivals may exit from the market or be satisfied with a less threatening, marginal market position. But if it achieves its intended aim by acceptable conduct - specifically superior skill or industry in making or marketing the item - the fact that it anticipates or even desires that its rivals will suffer adverse business fortunes hardly seems to be a state of mind that can fairly be the basis of a violation of the antitrust laws.

Language in *Alcoa* and *United Shoe* further suggests that *any* exclusionary business behavior, at least where not ecnomically inevitable, would violate Section 2.[1] That formulation is similarly of dubious assistance when applied to actual business conduct. The problem is that there are many forms of conduct, not economically

[1] The *Alcoa* court concluded that the mere existence of monopoly should not form the basis of a violation of Section 2 if monopoly were "thrust upon" the monopolist. 148 F.2d 416, 429. Judge Wyzanski in *United Shoe Machinery Corp., supra,* 110 F. Supp. 295, 341, interpreted the thrust upon theory to mean that a violation of Section 2 is made out if the exercise of controlling market power (the effect of which is to exclude competition) "though 'honestly industrial' were not economically inevitable but were rather the result of the firms free choice of business policies."

inevitable, which can have an exclusionary effect, and which it would clearly be unwise policy to deter. A seller may improve its product or sales force and succeed thereby in obtaining additional business. A monopolist may improve its production facilities so as to become more efficient and then pass that efficiency along to consumers in the form of lower prices. Such conduct may actually "exclude" existing or potential rivals, but surely should not be illegal under Section 2.

A fair and effective description of permissible business behavior by a monopolist must proceed beyond loose language dealing with "intent" or "exclusion" and come to grips with the specific conduct engaged in by the monopolist. For example, it is almost certainly legal for a monopolist to obtain a patent or an improvement on its products; on the other hand, it may not obtain a cluster of intricately related patents and erect a wall against challengers. [4] *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 (N.D. Ohio 1942), *modified*, 323 U.S. 386 (1945); Cf. 3 Areeda & Turner, *supra*, ¶704b at 115–116. A monopolist may lease or sell its product but cannot engage in a lease-only policy. *United States* v. *United Shoe Machinery, supra; LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966) *aff'g. in part Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964). A monopolist may advertise its product but may not engage in massive advertising which erects insurmountable barriers to challengers. *Bailey's Bakery, Ltd.* v. *Continental Baking Corp.*, 235 F. Supp. 705 (D. Ha. 1964).

Patents, leases and advertising may all be intentionally exclusionary, in the sense that they are designed for and have the effect of taking business away from actual or potential rivals, but only certain unjustifiable forms of such conduct have been found to support a finding of monopolizing under Section 2. Ultimately, a description of permissible behavior by a monopolist must take on some of the characteristics of a rule of reason analysis, inquiring beyond intent and exclusionary effect into whether the conduct at issue was *unreasonably* exclusionary or anticompetitive — that is, whether the anticompetitive effects of a practice outweigh its procompetitive consequences, taking into account whether the same procompetitive consequences could have been achieved through a less restrictive alternative. But unlike the conventional rule of reason, this balance will be struck in light of the critical fact that the company engaging in the conduct is a monopolist and that competitive markets are to be preferred over monopoly power in the enforcement of the antitrust laws. *See, Greyhound Computer Corp., Inc.* v. *IBM Corp.*, 559 F.2d 488, 498 (9th Cir. 1977), *cert. denied*, 434

U.S. 1040 (1978). By referencing the rule of reason, usually perceived as a standard to measure the legality of behavior by a sub-monopolist under Section 1, I do not mean to say that permissible behavior by a monopolist is the same as permissible behavior by a non-monopolist. There can be no doubt that otherwise legal behavior becomes competitively unacceptable in the monopoly context. *See, e.g., United States* v. *Griffith,* 334 U.S. 100, 105 (1948); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809 (1946).

Assuming a standard incorporating some concept of *unreasonably* exclusionary behavior must be applied to determine whether conduct by a monopolist violates the law, we next turn to the specific question of what *price* behavior is permissible in the monopoly context. [5]

B. *Alternative Rules of Pricing Behavior By a Monopolist.* It frequently occurs that a business rival (sometimes a new entrant) cuts price significantly below the price of a monopolist in order to take away part of its market. Assuming the monopolist responds (as Borden did in the present case) with a price cut of its own, in what circumstances would such behavior violate Section 2 of the Sherman Act or Section 5 of the FTC Act?

1. *Exclusionary and Discriminatory Pricing.* It is possible to argue that a monopolist should not be permitted to engage in responsive price cuts at all when a new, smaller challenger appears on the scene. If a legally mandated supra-competitive price were imposed, the smaller rivals would eventually cut into the market shares of the monopolist until its market position fell below the monopoly level. At that point the monopolist might be free to respond with any otherwise legal price strategy it felt would be effective. An alternative formulation, and one which finds support in the language of *Grinnell* and *United Shoe* (and is relied upon in the majority opinion here) is that a monopolist may not respond to a new challenger by lowering prices [6] strategically in competitive markets.[2] The rule requires that the monopolist not discriminate in price (or as sometimes formulated with the same effect - not earn

[2] The District Court in *Grinnell* discussed the issue of discriminatory pricing, *United States* v. *Grinnell Corp.*, 236 F. Supp. 244, 257 (D.R.I. 1964), and the Supreme Court affirmed with little more than passing reference to the issue. The Court stated that Grinnell had reduced prices in competitive markets and raised prices in markets in which it faced no competition. 384 U.S. 563, 570. The Court also mentioned with approval, in discussing the appropriate remedy to be determined on remand, that the government proposed to require Grinnell to sell on nondiscriminatory terms. *Id.* at 579.

In *United Shoe Machinery,* there is discussion of United Shoe's discriminatory pricing policy which "led to wide and relatively permanent variations on the rates of return" it secured on different machine types. The Court acknowledged that such discrimination constitutes no common law restraint of trade and though not "predatory, abusive, or coercive was in economic effect exclusionary" and hence a violation of Section 2. 110 F. Supp. 295, 340-41. Interestingly, the Court, citing difficulties in judicial supervision, did not attempt to deal with discriminatory pricing in its order. *Id.* at 349.

different rates of return) between geographic markets or between product categories, and thus that price reductions be across the board.

Both formulations have serious deficiencies. A rule that prevents a monopolist from cutting price in response to new or augmented competition requires the monopolist to wait passively as small, perhaps less efficient arrivals take business away.[3] During this time, consumers who continue [7] to buy from the monopolist are paying higher prices because the law prevents the monopolist from pursuing its own best business interests by instituting price reductions that may be possible due to its efficiency. New entrants protected by a legally mandated umbrella price may themselves charge higher prices than would otherwise be the case - sufficiently below the monopolist price to take some of its business but sufficiently high to make supra-competitive profits themselves. Pursuing this scenario, the whole industry may become economically inefficient for the period of time the administered price umbrella is in effect. Finally, a legally mandated umbrella price generates extremely burdensome administrative problems in supervising the monopolist's pricing policies. Suppose that raw material or labor costs increase for most members of the industry; is the monopolist required to increase its price to consumers on some proportional basis in light of its cost increase in order to avoid a violation? Suppose the monopolist improves the quality of its product. Must a court sit in judgment on the question of what constitutes a fair increase in price to take into account the more attractive features introduced?

A rule that prohibits strategic pricing (to avoid differential rates of return) and requires price reductions to be made uniformly across geographic markets is deficient for many of the same reasons discussed above and also raises additional problems. The rule wholly fails to reckon with the fact that a monopolist usually faces different costs, demands and degrees of competition in different markets. Thus, a monopolist operating nationally or across a wide range of products and confronted with agressive new competition in only one or two competitive markets is caught in a dilemma. It may steer toward Scylla - making uniform price reductions in all markets, including those where a price reduction is not called for from a competitive point of view, or Charybdis - watching without price response as new arrivals capture geographic or product segments of its market.

[3] If the challenger is as efficient as or more efficient than the monopolist, it doesn't need legal protection under most circumstances; as long as the monopolist sells above "cost," at least when "cost" is sensibly defined, it cannot exclude an equally efficient rival.

Taking all of these considerations into account, it seems unwise as a matter of policy and common sense not to let a monopolist respond to some extent to inroads generated by small rivals pursuing aggressive price stategies. The monopolist's price response is itself a wholesome part of the competitive process. Indeed, a major reason that antitrust law in other substantive areas preserves potential [8] competition and prevents the creation of undue and unnecessary barriers to entry is to induce companies with strong market positions to lower price in response to the threat or the presence of new entry.[4]

Assuming flexible price responses by a monopolist are not unreasonably exclusionary in and of themselves, the next question is whether there may come a point at which those price cuts are so substantial or otherwise unreasonably exclusionary as to constitute illegal monopolization.

2. *Cost-Based Rules of Predatory Pricing.* In an influential article on the question of predatory pricing, Professors Areeda and Turner have argued that predatory or exclusionary pricing by a monopolist should be assessed by a series of cost-based rules. P. Areeda & D. Turner, *"Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,"* 88 Harv. L. Rev. 697 (1975). The most important of these rules states that a monopolist should be held to violate Section 2 only where it sells "below cost," defining cost as average variable cost.[5] The authors assert that a firm which is selling at a short-term [9] profit-maximizing price is clearly not a predator even though it may be selling below its full cost. On the other hand, when a firm sells at less than average variable cost, it is taking an out of pocket loss on each unit sold. Excluding very special situations such as where the seller (though a monopolist) may be going out of business, such conduct can only be explained as part of the strategy to drive rivals out of business, and then recoup the earlier losses with higher than competitive prices. Also, sales at such low prices raise the spectre that success in the market will depend not on the relative efficiency of rivals but on which seller has a sufficiently long purse to subsidize these unit-by-unit competitive losses. Thus, a price at or

[4] For example, Section 7 of the Clayton Act has been interpreted to proscribe mergers whose effect may be substantially to lessen potential competition. *E.g., Procter & Gamble Co.* v. *FTC,* 386 U.S. 568 (1967); *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1964).

[5] The authors suggest the use of average variable cost as a surrogate for short-run marginal cost which is believed to be a truer measure of economic cost but virtually impossible to calculate. Average variable cost is the sum of all variable costs divided by units of output. Variable cost is cost which varies with changes in quantity of output and is a function of size of output change and time. Variable cost is contrasted with fixed cost which is theoretically constant irrespective of quantity of output. Full or total cost is the sum of fixed and variable costs. P. Areeda & D. Turner, *Predatory Pricing and Related Practices Under Section 2 of The Sherman Act,* 88 Harv. L. Rev. 697, 700, 716-718. Unfortunately, there is no unanimous view of the correct allocation between fixed and variable costs, nor given the elusive nature of these calculations is there likely to be one.

above average variable cost is presumed lawful; a price below is conclusively presumed unlawful.

This formulation has the considerable virtue of offering a single bright line formulation which would provide guidance as to permissible behavior to businessmen and also guidance to the courts and enforcement agencies. Several courts of appeals and district courts, in part influenced by the Areeda-Turner formulation, have recently adopted the below average variable cost rule to test for predatory pricing *See, Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3195 (Oct. 2, 1978); *Pacific Engr. & Prod. Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert denied*, 98 S. Ct. 234 (1977); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 813 (1977); *International Air Inds.* v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), cert denied, 424 U.S. 943 (1976); *ILC Peripherals Leasing Corp.* v. *IBM*, [1978-2] Trade Cas. ¶62,177 (N.D. Cal. 1978); *Weber* v. *Wynne*, 431 F. Supp. 1048 (D. N.J. 1977); *Inter City Oil Co.* v. *Murphy Oil Co.*, [1976-1] Trade Cas. ¶60,948 (D. Minn. 1976).

A different cost-based rule is suggested by Professor Posner, who would define predatory pricing below short-run marginal (*i.e.*, average variable) cost, *or* as "pricing at a level calculated to exclude from the market an equally or more efficient competitor." R. Posner, *Antitrust Law: An Economic Perspective*, 188 (1976). He would adopt a rebuttable presumption that predation is selling below long-term mariginal cost with intent to exclude a competitor, with average *total* costs serving as a reasonable proxy for long-term marginal costs. *Id.* 189–190. A defendant could rebut the prima facie case of predation by showing, because of changes in supply or demand, that its average total costs **[10]** were different than long-run marginal costs or that short-run marginal costs were the correct guide to efficient pricing. *Id.* at 190–191. This formulation apparently is predicated on the belief that a short-run marginal cost, or average variable cost, rule would be too permissive and would allow a monopolist to eliminate a competitor whose long-run costs might be equal to or lower than the monopolist's.[6] Short-run costs are invariably lower than long-run because the former may not include a variety of past expenses which have become fixed costs for existing competitors but are yet to be incurred by the new entrant.

Several courts have recognized the problem spotlighted by Posner and attempted to deal with it by adopting a two-step test for predatory pricing. The first standard to determine predation is

[6] For a similar statement see A. E. Kahn, *The Economics of Regulation: Principles and Institutions*, 85 (1970).

whether price is below marginal or average variable costs - the Areeda-Turner formulation. Even if it is not, a violation can occur if price is below average total costs and barriers to entry are high. *International Air Industries, Inc.* v. *American Excelsior Co., supra,* 517 F.2d 714, 734; *ILC Pheripherals Leasing Corp.* v. *IBM, supra,* ¶62,177 at 75,256-57. The theory appears to be that if entry barriers are high, a monopolist can drive equally efficient or nearly as efficient rivals out of business (or cow them into a complaint posture through price wars), and then raise its price to above competitive levels and reap monopoly profits before new entry can restore a competitive market.[7] [11]

Before assessing whether the average variable cost line is appropriate to determine what conduct is unreasonably exclusionary, it is essential to examine carefully and precisely the market conditions that Borden faced and the competitive tactics that it pursued.

C. *Borden v. Golden Crown - Competitive Responses.* As noted earlier, the record shows that Borden enjoyed a dominant market position throughout the period under review - that is, from 1969 through 1974. In late 1969, ReaLemon accounted for about 90 percent of national sales (ID 102),[8] with several smaller brands active in regional markets. Beginning about that time, however, Golden Crown began to expand from its midwest base and progressively penetrated markets in the east, northeast and southwest (ID 103). Since retailers usually carried only two brands of processed lemon juice - ReaLemon plus one other brand - it was predictable and not unusual that Golden Crown's early gains resulted principally in losses to the other small regional manufacturers (ID 104).

By mid-1970, however, Borden's ReaLemon brand was beginning to suffer some encroachment. Borden's 90 percent market share had fallen to 88 percent, and Borden had correctly identified Golden Crown as its major new competitive rival (ID 108). Golden Crown was enjoying some success because it was selling at retail for prices anywhere from 10 to 30 cents per bottle below ReaLemon (ID 115); for example, its 32 ounce size sold for 47 cents while ReaLemon sold for 61 cents (ID 121). Recognizing that Golden Crown's aggressive competitive stance plus the existing price spread would lead to a

[7] Several other variations have been offered. See F. M. Scherer, *Predatory Pricing and the Sherman Act: A Comment,* 89 Harv. L. Rev. 868 (1976); and O. E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis.* 87 Yale L. J. 284 (1977). Both approaches regard the average variable cost approach as rigid and simplistic and offer alternative assessments of unreasonably exclusionary pricing.

[8] ID 102 refers to the numbered paragraph of the initial decision containing the administrative law judge's findings of fact.

continuation of market share loss, Borden turned to a consideration of what its competitive response should be.

In 1971 and 1972, Borden supported ReaLemon with substantial advertising revenues and also cut its price to retailers through substantial trade promotions. Nevertheless, its market share continued to fall; it held 86.5 percent of the market by the beginning of 1973. In 1973 and 1974, Borden expanded its advertising activities and also increased its promotional allowances substantially - increasing the retailer margin to all outlets, including those that did not cut price, and, in some cases, producing a lower consumer price because retailers passed along some of the promotional allowances to consumers. Moreover, by 1974, Borden had moved to an approach of giving heavy promotion support for sales of ReaLemon in four key markets where it faced Golden Crown competition - New York, Philadelphia, Chicago, and Detroit (ID 123). [12]

By 1974 its advertising and promotional monies were double the amount available to retailers in 1967 (ID 125). As will be discussed more fully below, in some instances these allowances were so substantial as to bring Borden into the range of its average variable costs.

According to the trial judge, the record does not support findings that Borden at any point during these sales promotions sold ReaLemon at less than its average variable cost (ID 192). The lowest prices Borden offered were to the Niagara Frontier stores in Buffalo in 1973 where it sold at $4.05 a case and to Acme Supermarkets in Philadelphia in 1973 where it also sold at $4.05 a case (ID 187, 190). Average variable costs on ReaLemon delivered in those sales was $3.75 or $3.99 in the Buffalo transaction, and $3.83 or $3.99 on the Philadelphia transactions (depending on which of two allocation formulas for shipping costs is applied) (ID 187, 191).[9]

Although Borden may have been selling ReaLemon at more than its average variable cost, it does not follow that its price maneuvers were inadequate to blunt and eventually eliminate Golden Crown's challenge. The key to Borden's success (and the key to disposition of this case in my opinion) turns upon the fact that ReaLemon enjoyed a pronounced consumer preference which enabled it to hold its large

[9] Borden's ReaLemon price exceeds its average variable cost only because the trial judge treated advertising as a fixed expense (not contributing any cost whatsoever to Borden's variable costs) and because substantial elements of salesmen's salaries and administrative sales costs other than direct commissions on sales of ReaLemon were also treated as fixed rather than variable. I am doubtful that these represent defensible allocation decisions. For example, with respect to advertising, Borden itself treated advertising as a variable expense in its own bookkeeping system (ID 175) and, as discussed above, advertising was very much a strategic weapon used by Borden during the price war in the pursuit of its competitive goals.

Despite these doubts, I will accept the trial judge's interpretation on these points and hence assume that Borden did not sell at less than average variable cost.

market share virtually intact even though it was selling in the marketplace at a substantially higher price than its [13] small regional competitive rivals. This differential represented a "premium" that consumers were willing to pay in order to get the "big name" brand; and unless a challenger to ReaLemon made certain that its "new brand" sold at a price sufficiently below ReaLemon to make up for this consumer preference, the new brand could not compete with ReaLemon at all. Assuming that consumer preference at least to some extent persisted during the period of the price war, and Borden sold at a price close to its average variable costs, a challenger like Golden Crown which was approximately as efficient as Borden[10] would have to sell far below its own costs in order to maintain all or a substantial part of that price differential. Thus, the record shows that if Golden Crown were only to maintain a 10 cent price differential below ReaLemon on the 32 oz. bottle (about 5 cents less than the differential that existed at the beginning of the price war), Golden Crown would have to make its product available to retailers at $2.90 a case, fully a $1 per case below Borden's average variable cost (ID 198). To maintain a 5 cent differential in the marketplace, Golden Crown would have to make its product available to retailers at $3.40, about 50 cents below Borden's average variable cost. Clearly, this is a formidable obstacle for a new rival to surmount in order to withstand Borden's pricing response.

D. *Borden's Unlawful Pricing Policies.* The majority finds that Borden monopolized in violation of Section 2 because it answered Golden Crown's challenge with specific competitive responses intentionally designed to curtail the ability of that company to compete effectively in the market, and because it resorted to geographic price discriminations, selling at prices close to cost in markets where Golden Crown was active but maintaining much higher prices in less competitive markets. (Majority opinion at 22–32.) There is persuasive evidence in the record that supports both these findings, and substantial legal precedent for a conclusion that such behavior constitutes illegal monopolization.

I am hesitant, however, to rely on principles of intent for a finding of monopolization since intent in these cases is almost always multifaceted and uncertain, and should properly be relied upon only in the most unusual and rare circumstances. A finding of monopolization based on geographic price discrimination can be criticized as an unreasonable hampering of the monopolist's ability to compete and an economically unrealistic solution. [14]

[10] Actually, Golden Crown's costs were very close to, if not below, Borden's (ID 195). See majority opinion, p. 30.

Even if neither of those grounds were regarded as adequate to sustain a finding of a violation, there is another aspect of Borden's market behavior which demonstrates clearly that its conduct was "unreasonably exclusionary" in light of its monopoly market position. A realistic appreciation of the nature of competition in this market begins with the recognition that Borden, prior to Golden Crown's challenge, was able to sell at a price that was 30 percent and more higher than prices charged by regional competitors (ID 82). This pronounced consumer preference was largely a result of the fact that Borden had been in the market for many years before Golden Crown appeared,[11] possessed overwhelming brand recognition and consumer loyalty simply by virtue of having been in the market for so long, enjoyed the continuing benefits of its prior advertising, and had established itself over the years through sales promotions and otherwise cordial relations with retailers.[12]

Many of these advantages, particularly brand recognition and brand loyalty induced by advertising, were achieved through the expenditure of monies which did not constitute a current cost to Borden in the years in which it was engaging in price competition with Golden Crown. As a consequence, even though Golden Crown was equally as efficient or more efficient than Borden, Borden could drop its ReaLemon prices to a point at or slightly above its average variable cost, maintain those prices over an extended period of time as a result of its enormous sales and asset position in other product lines, and be assured that it would eventually drive Golden Crown or any other similar challenger to the wall. Thus, where a monopolist enjoys a pronounced consumer preference due to advertising and promotion, a rule which permits [15] the monopolist to drop its price to average variable cost in response to competitive challenge in effect means the monopolist will surmount almost any competitive challenge from smaller entrants. A definition of exclusionary pricing which results in preferring a monopolist for no reason other than it is a monopolist, and disadvantaging a small company not because it is less efficient but because it is a new entrant and because it is smaller, stands antitrust policy on its head.[13]

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[11] There is a striking contrast between the ways Borden and Golden Crown entered the market. Borden acquired a monopoly in 1962. The predecessor company had the sole nationally advertised and distributed brand for 30 years prior to Borden's acquisition, and Borden maintained this status for 10 years before Golden Crown entered. The "ReaLemon" trademark had been in use for 30 years by this time.

[12] Borden's brand preference was not the result of a superior product. Borden's documents showed and Judge Hanscom found that the price premium was due to image not product superiority (ID 83).

[13] Professor Scherer arrived at the same conclusion – *i.e.*, that the average variable cost formulation for illegal monopolizing is inadequate when the monopolist enjoys a significant consumer preference: "An image advantage, permitting the maintenance of a price premium, is conceptually analogous to a unit cost advantage. Either enhances the dominant firm's incentive to cut prices temporarily to exclude less-favored rivals. What society obtains following successful image-induced exclusionary pricing is not the freeing of resources that can be

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Assuming that a simple formula that defines predatory pricing as sales below average variable costs results in an anticompetitive result where a monopolist enjoys pronounced brand allegiance, what alternative rule should be imposed. Specifically, what should Borden have done once its market position was challenged to avoid an unreasonably exclusionary response?

The statement of the problem provides a strong indication of the solution. Since Borden's entrenched advantage derived from brand loyalty that permitted the charging of a substantial premium price, it was unreasonably exclusionary to have narrowed the gap between itself and a new challenger [16] so as to eliminate wholly or substantially the previous premium margin – at least while it continued to enjoy a monopoly market share. A correct rule must take into account the past expenditures which enabled Borden to achieve its current monopoly position – that is, advertising, promotion and distributional expenses, and perhaps the premium it paid in the first place to acquire a monopolist (which itself may reflect prior variable cost expenditures which have a current marketplace impact). These past expenses to some extent permit Borden to charge a premium price, and yet would not be included in its average variable costs.

This is not to say that no price response by a monopolist is permissible. For example, a price cut to average full cost would be a restrained and moderate competitive response - particularly if introduced slowly and progressively over a period of time.[14] Under this standard, the monopolist [17] would be able to respond selectively to competitive challenges down to its level of average full cost, but ordinarily would not be able to drive an equally efficient challenger out of the market.[15] If the challenger is highly inefficient in comparison to the monopolist even this moderate response should

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employed more effectively elsewhere, but rather, higher prices and profits accompanied by increased consumption of the 'premium' product. Assessing the social efficacy of such cases calls for strong non-economic value judgments. . . . . I believe that the image advantage – exclusionary pricing is empirically important, and I find it hard to avoid a value judgment that temporary price cutting to eliminate producers handicapped only by an inferior brand image is socially undesirable." Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869, 889 (1976).

[14] Another element of "restraint" by monopolists enjoying a consumer preference position might be not to cut price drastically (*i.e.*, below average total cost) in the first year or eighteen months in which a challenger is present in the market. That too could be unreasonably exclusionary in that it may have the effect of eliminating or crippling the competitive potential of the challenger before it has an opportunity to seek consumer acceptance, differentiate its product, or achieve for itself efficiencies of scale that it could ultimately attain. *Cf.* O. Williamson, *supra*, 87 Yale L. J. 285, 296.

Borden's progressively more vigorous price and advertising responses to Golden Crown, running over a period of four years, do not indicate a lack of restraint with respect to this *timing* dimension. But as the case demonstrates, restraint in timing of the monopolist's response to competition, standing alone, is not sufficient to make the response reasonable.

[15] The full cost rule may find support in the Posner approach (Posner, *supra*, pages 185–86), since it would prevent pricing at less than full cost to exclude an equally efficient rival. The limitation on monopolist's discretion would continue only so long as there is a pronounced consumer preference. If it disappeared in the course of

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allow the monopolist to protect its legally acquired market position. If the monopolist's product is superior, or its brand image impervious to price competition, it may hold its market share at the higher price. Finally, if the challenger is an equally or more efficient competitor than the monopolist, the monopolist's market share should soon decline to the point where it may respond competitively under more lenient rules that apply to non-monopolists. The time lag before that occurs should allow the challenger sufficient opportunity to become established in the market, and then to meet the former monopolist's response on its merits.[16]

[18] The approach adopted here, by departing from a standard of predation depending on average variable cost in all instances, introduces some uncertainty into the law. That is unavoidable, however, if we are to apply to a monopolist's business behavior those judgmental factors inherent in a rule of reason. As noted, the problem here is that the way in which costs are computed failed to account for a major advantage of a monopolist which does not relate to its superior skill, foresight, or industry nor to quality differences between its product and the product of rivals, and yet serves mightily to preserve its monopoly position.

The proposed rule is not inconsistent with recent cases which have reacted approvingly to the notion of defining predatory prices in most situations as those that are below average variable cost. Thus, in *Hanson* v. *Shell Oil Co.*, 541 F.2d., 1352 (9th Cir., 1976), the owner of a group of small gasoline stations charged Shell with predatory pricing designed to drive competitors out of the market. The 9th Circuit adopted the average variable cost formula for predatory pricing, explaining its decision in the following language:

> If its prices were above its costs, and nevertheless Shell's did drive Hanson out of business this can only be because Hanson was so inefficient that at prices which Shell could make a reasonable profit, he could not. The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business. 541, F.2d at 1358–59.

It is precisely because Borden's price above average variable cost could drive an equally efficient rival out of business that an average

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renewed competition (which is another way of saying challengers had overcome barriers to entry depending on the monopolists successful product differentiation), then there would be no need for special rules limiting the monopolist's price response beyond those that would apply in any monopoly situation.

[16] While it is not necessary to address the question here, the same general approach should apply where a company takes advantage of pronounced consumer preferences, generated by previous expenses not included in current average variable costs, to *achieve* monopoly power at the expense of equally efficient competitors. There too, a sensible rule must find a way to take into account those prior expenditures which made it possible for the company to master its rivals and gain or regain a monopoly position.

variable cost formula is inappropriate where there is pronounced consumer brand loyalty. [19]

Several other cases adopting an average variable cost formulation to define predation, have considered whether high entry barriers were present and thus warranted an exception to the average variable cost rule. *International Air Industries, Inc.* v. *American Excelsior Co., supra,* 517 F.2d 714, involved the air conditioning cooler pad industry. The court found no reason to depart from an average variable cost rule unless "barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible." *Id.* at 724. It was concluded that entry barriers were non-existent and that defendant had not sold below its average cost in any event. *Id.* at 725. In *ILC Peripherals Leasing Corp.* v. *IBM* ("Memorex"), *supra,* [1978–2] Trade Cas. ¶62,177, the court determined that entry barriers were not overly high and that there was no evidence that IBM had sold below a short-run, profit-maximizing price. *Id.* at 75,257. In *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp., supra,* 551 F.2d 790, 797, the Tenth Circuit adopted an average variable cost rule rejecting a below total cost rule under the circumstances of the case. The case involved sale of a chemical used in solid rocket fuel for which there was dramatically decreased demands. The industry had gone from four to two suppliers, each of which had a capacity exceeding total demand. The court concluded that it was inevitable that only one company would survive.

In *Janich Bros. Inc.* v. *American Distilling Co., supra,* 570 F.2d, 848, 856–58, the Ninth Circuit adopted an average variable cost rule and discussed the shortcomings of using a total cost rule. The court stated that "As implied in *Hanson,* an across-the-board price set at or above marginal cost should not *ordinarily* form the basis of an antitrust violation." *Id.* at 557 (emphasis added). The *Memorex* court properly construes the statement as indicating that the exception for a market with high entry barriers is still the rule of the Ninth Circuit. [1978–2] Trade Cas. ¶62,177 at 75,757.

Since pronounced consumer brand loyalty is a barrier to entry, the line of cases described above would also counsel a departure from the average variable cost rule here. [20]

There remains only the question whether Borden sold below average total cost during the period under review, and there appears to be no doubt that it did. According to Borden's own internal documents, Borden's total cost for cases of 32 oz. ReaLemon lemon juice during 1973 was $6.09 or $5.93 (depending upon direct or non-direct shipment) (CX 293; ID 172). As previously discussed (page 12),

Borden's price for sales promotions in Philadelphia and Buffalo at this time was $4.05 per case. These sales were well below total cost, and, in fact, were only 6 to 30 cents above average variable cost. Moreover, these sales were not isolated instances. There was evidence that during 1973, 84 percent of Borden's 32 oz. ReaLemon lemon juice was sold "on deal"; that is, with promotional allowances (ID 133). Allowances in Borden's competitive markets in 1973 commonly ranged from $1.50 to $2.25 per case (ID 139, 141, 142, 143). Deducting these allowances from the average net selling price per case in 1973 of $6.59 (CX 293), leaves selling prices of $4.34 to $5.09. Thus, it is clear that there were many sales below total cost.

II. REMEDY FOR BORDEN'S PREDATORY CONDUCT

I agree with the conclusion in Chairman Pertschuk's separate opinion that the Commission has the authority under Section 5 to enjoin continued use of a trademark where that injunction is necessary to dissipate monopoly power that has been illegally acquired or used. In light of the reasoning of this concurring opinion, however, I would conclude that such extraordinary relief is unnecessary.

An order preventing Borden from pricing ReaLemon at levels which would be "unreasonably exclusionary" - as that term is described in this opinion - would allow new entrants, regardless of their size and access to financial subsidies, to compete effectively with Borden if their level of efficiency so permitted. I am in general agreement with the majority's order. In light of the reasoning of this opinion, I would, however, modify the order by deleting subparagraph (1) in its entirety. As noted previously, I do not subscribe to a geographic market or product market, price discrimination theory of monopolization. [21]

I believe the monopolist should be accorded some leeway to respond to aggressive competition by a new entrant or an existing competitor. The response must be tempered, however, so as not to eliminate the equally or more efficient competitor. Subparagraph (2) of the order will accomplish this end in this market (and will accomplish that end in most competitive situations). I would define "unreasonably low prices" as sales below average total cost. This limit would apply — *i.e.,* would be necessary to avoid a restraint or elimination of competition — only so long as Borden continued to exercise monopoly power.

Lastly, subparagraph (3) directs that Borden cease and desist from promotional allowances which eliminate competition between Borden and its competitors. This provision recognizes that promotional

allowances, along with advertising, functioned as the primary means through which Borden maintained its monopoly position. Some provision addressing promotional practices, beyond subparagraph 2, is warranted as a "fencing-in" provision. *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). In light of Borden's violation of Section 5, that provision should impose greater restriction than is required by subparagraph (2) but nonetheless, permit Borden to respond moderately to a new challenger. Therefore, I agree with subparagraph (3) of the order.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying opinion having determined to sustain the initial decision with certain modifications:

It is ordered, That the initial decision of the administrative law judge, pages 1–162, be adopted as the findings of fact and conclusions of law of the Commission, except to the extent indicated in the accompanying opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered: [2]

ORDER

It is ordered, That Borden, Inc., and its successors and assigns, officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, affiliate, division or other device, in connection with the production, marketing and sale of processed lemon juice in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(1) Granting price reductions, directly or indirectly, which result in different net prices among Borden's ReaLemon customers, whether or not such customers compete in the same geographic area, which differences in price are not attributable to differing costs of manufacture, sale or delivery, and the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;

(2) Selling ReaLemon lemon juice below its cost or at unreasonably low prices, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice;
(3) Granting promotional allowances or payments of any kind for customers' promotional services, the effect of which is to hinder, restrain or eliminate competition between respondent Borden and its competitors in the production, marketing and sale of processed lemon juice. [3]

It is further ordered, That Borden, Inc., shall, within sixty (60) days from the date this order becomes final, and every year thereafter for a period of ten (10) years, submit a detailed written report of its actions, plans and progress in complying with the provisions of this order, and fulfilling its objectives.

IN THE MATTER OF

HERBERT R. GIBSON, SR., ET AL.

Docket 9016. Interlocutory Order, November 8, 1978

ORDER DENYING MOTION TO WITHDRAW MATTER FROM ADJUDICATION

The administrative law judge has certified to the Commission a consent settlement proposed by respondents Herbert R. Gibson, Sr., and Belva Gibson. The consent is the second such consent proposal by these respondents, the first having been denied by the Commission on September 21, 1976.

Complaint counsel have expressed opposition to the proposed agreement primarily because it would allow respondents to establish trade show fees based on volume of sales. Complaint counsel maintain that:

> [I]f Gibson Senior can get suppliers to pay a percentage of their sales to him in order to participate in the Gibson Trade Show, (which is exactly what he does now and what this case is all about) there has to be an actual or perceived connection between Gibson Senior and the Gibson store buyers. In other words, . . . separation and insistence upon Volume exclusion are mutually contradictory.[1]

We are not persuaded, however, that the manner in which the trade show fees are set bears a necessary relationship to the question of insuring separation between the Gibson Trade Show and the Gibson retail operation. As we noted in response to the first proposed consent settlement, a key element of any acceptable settlement is the assurance that respondents maintain a "high, impenetrable wall" between the two operations. In our view this objective can be achieved short of restricting the methods for establishing trade show fees.

Nevertheless, despite our differences with complaint counsel on the fee issue, we do not believe it is appropriate to remove the proposed settlement from litigation. There are simply too many deficiencies in the proposal to warrant withdrawal at this time. For example, we are not satisfied that the proposed order adequately assures that the trade show will be open on a non-discriminatory basis to all suppliers and retailers. Other concerns are described in the law judge's order certifying the proposed settlement. See Certification to the Commission of a Consent Settlement Offered by Respondents H.R. Gibson, Sr. and Belva Gibson at 8–9.

[1] Answer in Opposition to Motion for Conference to Consider Disposition of Proceeding Without Further Litigation and for Certification of Proposed Settlement Agreement at 4–5.

While a settlement may be attainable, we believe the nature and extent of the issues remaining are such that further negotiations should continue in the context of the adjudicatory proceeding under the supervision of the administrative law judge. Accordingly,

It is ordered, That the motion to withdraw matter from adjudication be, and the same hereby is, denied.

IN THE MATTER OF

CHRYSLER CORPORATION, ET AL.

Docket 9072. Interlocutory Order, Nov. 9, 1978

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

On October 27, 1978, respondents Chrysler Corporation and Chrysler Credit Corporation moved before the administrative law judge (ALJ) that the hearings in this matter be adjourned until March 1, 1979, to afford them an opportunity to solicit the cooperation of many of their independently owned dealers in the execution of the proposed settlement. Complaint counsel joined in the respondents' motion to adjourn. The ALJ, by order issued on October 30, 1978, declined to cancel the hearings in the absence of an assurance that respondents have signed or shortly would sign a consent agreement which is binding upon them. Respondents subsequently filed an application with the Commission for leave to appeal, arguing that the ALJ has abused his discretion in denying their motion.

Although settlement in this case is not a "certainty," both sides have asserted that there is a "strong likelihood" that agreement will be reached, and under such circumstances the request of the contending parties that the proceedings be stayed is highly compelling. Nevertheless, we cannot find an abuse of discretion in the law judge's contrary determination not to adjourn the hearings for a period of four months, at which time hearings might have to resume if respondents' dealers (and apparently, as a result, respondents) were to prove unwilling to accede to the proposed settlement.

The law judge possesses broad discretion in scheduling a trial so as to facilitate a prompt resolution of the issues, either through an adjudicated order or a negotiated settlement. To this end, the ALJ has full authority to postpone scheduled hearings so that parties to a proposed settlement may confer, under the supervision of the law judge, with third parties whose cooperation is deemed necessary for the success of the settlement. But it is the law judge, not the Commission, who is best positioned to weigh the length of the delay against the prospects for third party approval. While the parties have made out a strong case for postponement in this instance, the Commission will not disturb an ALJ's decision to proceed with trial or postpone hearings in the absence of a clear abuse of discretion. Accordingly,

It is ordered, That respondents' application for leave to appeal is denied.

IN THE MATTER OF

CREDIT BUREAU ASSOCIATES, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-2936. Complaint, Nov. 9, 1978 — Decision, Nov. 9, 1978

This order, among other things, requires a Camden, N.J. credit reporting firm and its partners to cease failing to provide properly identified consumers with requested file information; reinvestigate disputed information; incorporate current findings in consumer files; and promptly advise such consumers of the results of the reinvestigation, without charge. Additionally, the order prohibits the firms from using consumers' phone numbers for debt collection purposes; and requires them to maintain, for a prescribed period, records regarding the manner and form of their compliance with the terms of the order.

Appearances

For the Commission: *Shirley F. Norris.*

For the respondents: *Richard D. DeCon, Capehart & Scatchard,* Camden, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Fair Credit Reporting Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the accompanying order to cease and desist, "consumer report," "consumer reporting agency" and "file" are defined as set forth in Sections 603(d), 603(f) and 603(g), respectively, of the Fair Credit Reporting Act.

PAR. 2. Respondent Credit Bureau Associates is a partnership existing and doing business under and by virtue of the laws of the State of New Jersey, with its trade name registered in Camden County, New Jersey, and its principal office and place of business

located at 817 Carpenter St., Camden, New Jersey. Said respondent is a "consumer reporting agency."

Respondent Camden Credit Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey. Said respondent is a partner in Credit Bureau Associates and is a "consumer reporting agency."

Respondent Credit Information Center, Inc., d/b/a Credit Information Center of West Chester, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 1154 West Chester Pike, West Chester, Pennsylvania. Said respondent is a partner in Credit Bureau Associates and is a "consumer reporting agency."

Respondent Norristown Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey. Said respondent is a partner in Credit Bureau Associates and is a "consumer reporting agency."

Respondent Suburban Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey. Said respondent is a partner in Credit Bureau Associates and is a "consumer reporting agency."

Respondent Charles W. Swan, Jr. is an individual and an officer of Camden Credit Association. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is the same as that of said corporation.

Respondent George C. Whittam is an individual and an officer of Credit Information Center, Inc. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is 1154 West Chester Pike, West Chester, Pennsylvania.

Respondent Bernard S. Becker is an individual and an officer of Norristown Credit Bureau, Inc. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is the same as that of said corporation.

Respondents Woodrow W. French and John J. Lamplugh are individuals and officers of Suburban Credit Bureau, Inc. In said capacity they are responsible for that corporation's activities as a

partner in Credit Bureau Associates. Their business address is the same as that of said corporation.

Respondents Camden Credit Association, Credit Information Center, Inc., Norristown Credit Bureau, Inc., Suburban Credit Bureau, Inc., Charles W. Swan, Jr., George C. Whittam, Bernard S. Becker, Woodrow W. French and John J. Lamplugh thus formulate, direct and control the policies, acts and practices of respondent Credit Bureau Associates, including those hereinafter set forth.

PAR. 3. All the acts and practices alleged herein took place and are taking place in the ordinary course of respondents' business and occurred subsequent to April 25, 1971, the effective date of the Fair Credit Reporting Act.

PAR. 4. In the regular course and conduct of their business, respondents engage in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports for use by others in making a decision concerning whether to grant credit, underwrite insurance or employ the subject of such report.

PAR. 5. Respondents, in certain instances, fail, upon request and proper identification of the consumer, to clearly and accurately disclose to the consumer the nature and substance of all information (except medical information) in the file on the consumer at the time of the request.

Therefore, respondents are in violation of Section 609(a)(1) of the Fair Credit Reporting Act.

PAR. 6. When the completeness or accuracy of an item of information in his or her file is disputed by a consumer, respondents fail in certain instances to:

(a) Reinvestigate the disputed information within a reasonable period of time;

(b) Record, after reinvestigation, the current status of information disputed by the consumer; and

(c) Promptly delete information which is found to be inaccurate or not verifiable after reinvestigation.

Therefore, respondents are in violation of Section 611(a) of the Fair Credit Reporting Act.

PAR. 7. After reinvestigation of disputed items of information in the file on the consumer, in certain instances where there were no reasonable grounds to believe that the dispute was frivolous or irrelevant, the respondents retained the disputed items in subsequent consumer reports by failing to delete said information, failing to clearly note the existence of a dispute and failing to enclose a brief

statement of the consumer's version of the dispute or an accurate summary thereof.

Therefore, respondents are in violation of Section 611(c) of the Fair Credit Reporting Act.

PAR. 8. In the course and conduct of their business, in certain instances, respondents have failed to provide disclosure of information without charge to consumers who contact respondents within thirty days of the consumer being notified by a user of consumer reports that credit has been denied based wholly or in part on the basis of a consumer report issued by respondents.

Therefore, respondents are in violation of Section 612 of the Fair Credit Reporting Act.

PAR. 9. In the course and conduct of their business, when consumers have appeared in person at respondents' place of business and have requested disclosure of information in the file relating to the consumer, as a condition precedent to the disclosure, respondents have demanded that the consumer reveal information in excess of that information necessary for proper identification of the consumer.

Typical and illustrative of the excessive demands for information are (1) demand for five (5) years of previous address history, (2) demand for home telephone numbers and other telephone numbers, and (3) demand for disclosure of previous employment.

Therefore, respondents have violated Section 610(b)(1) of the Fair Credit Reporting Act by placing onerous and excessive requirements on the right of consumer disclosure.

PAR. 10. The acts, practices and omissions set forth in Paragraphs Five through Nine herein are in violation of the Fair Credit Reporting Act and, pursuant to Section 621(a) of that Act, respondents have thereby violated Section 5(a) of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Fair Credit Reporting Act and the Federal Trade Commission Act, as amended, and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the

aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and,

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Credit Bureau Associates is a partnership existing and doing business under and by virtue of the laws of the State of New Jersey, with its trade name registered in Camden County, New Jersey, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey.

Respondent Camden Credit Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey. Camden Credit Association is a partner in Credit Bureau Associates.

Respondent Credit Information Center, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 1154 West Chester Pike, West Chester, Pennsylvania. Said corporation does business under the name Credit Information Center of West Chester. Credit Information Center, Inc. is a partner in Credit Bureau Associates.

Respondent Norristown Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey. Norristown Credit Bureau, Inc. is a partner in Credit Bureau Associates.

Respondent Suburban Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey. Suburban Credit Bureau, Inc. is a partner in Credit Bureau Associates.

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Respondent Charles W. Swan, Jr. is an individual and an officer of Camden Credit Association. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is the same as that of said corporation.

Respondent George C. Whittam is an individual and an officer of Credit Information Center, Inc. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is 1154 West Chester Pike, West Chester, Pennsylvania.

Respondent Bernard S. Becker is an individual and an officer of Norristown Credit Bureau, Inc. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is the same as that of said corporation.

Respondents Woodrow W. French and John J. Lamplugh are individuals and officers of Suburban Credit Bureau, Inc. In said capacity they are responsible for that corporation's activities as a partner in Credit Bureau Associates. Their business address is the same as that of said corporation.

Respondents Camden Credit Association, Credit Information Center, Inc., Norristown Credit Bureau, Inc., Suburban Credit Bureau, Inc., Charles W. Swan, Jr., George C. Whittam, Bernard S. Becker, Woodrow W. French and John J. Lamplugh thus formulate, direct and control the policies, acts and practices of respondent Credit Bureau Associates.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Credit Bureau Associates, a partnership; and Camden Credit Association, Credit Information Center, Inc., Norristown Credit Bureau, Inc. and Suburban Credit Bureau, Inc., corporations, and partners in Credit Bureau Associates, and their successors and assigns, and their officers; and Charles W. Swan, Jr., George C. Whittam, Bernard S. Becker, Woodrow W. French and John J. Lamplugh, individually and as the officers of the corporate partners of Credit Bureau Associates responsible for the operations of said partnership; and respondents' agents, representatives, employees, directly or through any corporation, subsidiary, division or any other device, in connection with the collecting, assembling, evaluating or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit

Reporting Act (15 U.S.C. 1681, *et seq.*) do forthwith cease and desist from:

1. Failing to disclose promptly by telephone, mail or in person, upon request and proper identification of the consumer, clearly and accurately, the nature and substance of all information (except medical information) in the file on the consumer at the time of the request.

2. Failing, when the completeness or accuracy of an item of information in the file is disputed by the consumer, unless there are reasonable grounds to believe that the dispute is frivolous or irrelevant, to (a) reinvestigate the disputed information within a reasonable period of time; (b) record, after reinvestigation, the current status of information disputed by the consumer; (c) promptly delete information which is found to be inaccurate or not verifiable after the reinvestigation; and (d) promptly include the consumer's statement of dispute if the controversy is not resolved.

3. Failing, whenever a statement of dispute has been filed, unless there are reasonable grounds to believe that the dispute is frivolous or irrelevant, to clearly note in any subsequent consumer report containing the information in question that it is disputed by the consumer, and to provide either the consumer's statement of dispute or a clear and accurate summary thereof.

4. Failing, when the consumer is granted by the Fair Credit Reporting Act the right to receive disclosure of the information in the file pertaining to that consumer without charge, to provide such information disclosure without charge.

5. Failing, when respondents reinvestigate disputed items of information, to promptly inform the consumer of the results of such reinvestigation.

6. Failing, where the consumer's file contains codes, symbols or any abbreviations, to deliver a copy of the key to such codes, symbols or abbreviations to the consumer.

It is further ordered, That, where respondents obtain telephone numbers from consumers, respondents shall not use such telephone numbers for any debt collection activity.

It is further ordered, That respondents shall, at all times, subsequent to the effective date of this order, maintain complete business records about the manner and form of their compliance with this order during the immediately preceeding two year period. Such records shall include logs, journals, or other compilations of all correspondence with consumers and consumer report applicants or subscribers, policy directives, interview reports, complaints from consumers and consumer report applicants or subscribers, and other

pertinent documents. Such records shall be kept separate from the consumer files and shall be made available for inspection and photocopying by any authorized representative of the Federal Trade Commission upon reasonable notice at respondents' place of business or other properly designated location.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all employees now or hereafter engaged in the collecting, assembling, evaluating or furnishing of consumer information to third parties and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents or in the partnership entity, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or partnership, the creation or dissolution of subsidiaries or any other change in the legal entities which may affect compliance obligations arising out of this order.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment as described in this order and of his new affiliation with a new consumer reporting business or employment by a consumer reporting agency. In addition, for a period of ten years from the effective date of this order, each individual respondent shall promptly notify the Commission of each affiliation with a new consumer reporting business or employment by a consumer reporting agency. Each such notice shall include the individual respondent's new business address and a statement of the nature of said business or employment in which he is newly engaged as well as a description of his duties and responsibilities in connection with said business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders, or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that

any past or future conduct of respondents complies with the rules or regulations of, or the statutes administered by the Federal Trade Commission.

IN THE MATTER OF

FORD MOTOR COMPANY

Docket 9105. Interlocutory Order, Nov. 16, 1978

ORDER DIRECTING ADMINISTRATIVE LAW JUDGE TO FILE RECOMMENDATION AND SETTING DATE FOR RESPONDENT'S ANSWER

On November 7, 1978, complaint counsel filed with the administrative law judge (ALJ) a Motion Requesting the Commission To Seek Injunctive Relief Under Section 13(b) Of The Federal Trade Commission Act. By order dated the same day, the ALJ certified the motion to the Commission because he lacked authority to rule on the request. However, the ALJ did not include the recommendation referred to in Rule 3.22(a). By motion of November 13, 1978, respondent Ford Motor Company seeks a referral of complaint counsel's motion to the ALJ or, alternatively, an extension of Ford's time to respond to the motion to and until December 1, 1978.

While recommendations have not invariably accompanied certifications in the past, and we have not insisted on receiving them, the Commission believes that the law judge in the great majority of certified motions has a unique and valuable perspective which would assist the Commission in its consideration of such motions.

In directing the ALJ to file a recommendation, we do not mean to require that he duplicate the inquiry which the Commission itself must conduct before initiating suit under Section 13(b). Rather, our intention is to afford the ALJ an opportunity to facilitate the Commission's disposition of the motion by sharing any relevant observations he might possess on the basis of the proceedings to date. Where hearings have not yet commenced, as in this case, the ALJ's assistance to the Commission may be limited to a forecast of the duration of the administrative proceeding, enabling the Commission to weigh the need for interim relief. Thus, the scope of the ALJ's consideration of the certified motion will necessarily be a function of the extent to which he is familiar with the issues and any evidence bearing upon the motion.

Because a motion for a preliminary injunction is clearly beyond the ALJ's authority we see no need for the ALJ to afford respondent an opportunity to comment on the motion to certify. However, we will extend Ford's time for filing an answer to the motion for a preliminary injunction.

It is ordered, That the administrative law judge file his recommen-

dation with respect to the motion for a preliminary injunction with the Commission by November 27, 1978.

It is further ordered, That respondent's time for filing an answer to the motion for a preliminary injunction with the Commission be extended to and until November 27, 1978.

IN THE MATTER OF

NATIONAL COMMISSION ON EGG NUTRITION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8987. Decision, July 20, 1976 — Modifying Order, Nov. 17, 1978

This modified order to cease and desist replaces the order issued on July 20, 1976, 41 FR 34939, 88 F.T.C. 89. In accordance with the November 29, 1977 decision and judgment of the Court of Appeals for the 9th Circuit, as amended on December 6, 1977 (570 F.2d 157 (1977)), the instant order mandates disclosure of controversy among medical experts as to the relationship of dietary cholesterol, including that in eggs, to heart and circulatory disease only when NCEN chooses to make a representation regarding the state of the available evidence or information concerning the controversy.

MODIFIED ORDER TO CEASE AND DESIST

Respondents, having filed in the United States Court of Appeals for the Seventh Circuit petition for review of the Commission's cease and desist order issued herein on July 20, 1976; and the Court having rendered its decision modifying the Commission's order and, as so modified, affirming and enforcing the order; and the Supreme Court of the United States having denied on October 2, 1978, a petition for writ of certiorari filed by the National Commission on Egg Nutrition:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read as follows:

It is ordered, That respondents National Commission on Egg Nutrition and Richard Weiner, Inc., corporations, their successors and assigns, either jointly or individually, and respondents' officers, agents, representatives, and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of eggs for human consumption do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that there is no scientific evidence that eating eggs increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

2. Represents that there is scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of heart

attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

3. Represents that there is scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

4. Represents that eating eggs does not increase the blood cholesterol level in a normal person;

5. Represents that the blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake;

6. Represents that the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake;

7. Represents that the average human body eliminates the same amount of cholesterol as that eaten;

8. Represents that dietary cholesterol, including that in eggs is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells; or

9. Utilizes the name "National Commission on Egg Nutrition" unless it is clearly and conspicuously disclosed in immediate conjunction with the name that the National Commission on Egg Nutrition is composed of egg producers and other individuals and organizations of, or relating to, the egg industry.

B. Disseminating, or causing the dissemination, of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that there is a controversy among medical experts concerning the relationship of dietary cholesterol, including that in eggs, to heart disease, and that respondents are presenting their side of that controversy.

C. Disseminating, or causing the dissemination of, any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce' is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that there exists, or describes, scientific evidence which supports the theory that consumption of dietary cholesterol, including that in eggs, does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the state of the available evidence or information concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.

D. Disseminating, or causing the dissemination of, any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition, or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition.

2. Misrepresents in any manner the physiological effects of consuming dietary cholesterol or eggs.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions, and to all current and future members of respondent National Commission on Egg Nutrition.

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report, in writing, signed by respondent, setting forth in detail the

manner and form of its compliance with the order to cease and desist.

IN THE MATTER OF

BLOCK DRUG COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9050. Complaint,[1] *July 29, 1975 — Decision, Nov. 17, 1978*

This consent order, among other things, requires Grey Advertising, Inc., a New York City advertising firm, to cease misrepresenting or making unsubstantiated claims regarding the performance or efficacy of denture adhesives and cleansers.

Appearances

For the Commission: *Melvin H. Orlans* and *Mark A. Heller.*

For the respondents: *Leonard Orkin* and *Stuart L. Friedel, Davis & Gilbert,* New York City.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint which charges the above-named respondents with violation of the Federal Trade Commission Act; and

Respondent Grey Advertising, Inc. ("Grey") and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent Grey of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent Grey that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Grey is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 777 Third Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject

[1] Reported in 90 F.T.C. 893.

matter of this proceeding and of respondent Grey, and the proceeding against respondent Grey is in the public interest.

ORDER

It is ordered, That respondent Grey Advertising, Inc., and its officers, representatives, agents and employees directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of products, by the respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statements or representations directly or by implication concerning any performance or other characteristic or attribute of any dental product, except denture cleansers, unless respondent possessed and relied upon a reasonable basis for each such statement or representation at the time it was made or respondent can establish that it neither knew nor should have known that its basis was not reasonable.

2. Making any comparative statements or representations directly or by implication concerning any performance attribute of any competing denture cleanser products unless respondent possessed and relied upon a reasonable basis for each such statement or representation at the time it was made or respondent can establish that it neither knew nor should have known that its basis was not reasonable.

3. Misrepresenting in any manner the effectiveness of any denture adhesive product.

4. Representing, directly or by implication, that:

a. Every user of denture adhesives, regardless of his or her particular denture holding problem, can eat any of a group of so-called "problem" foods (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort; and/or

b. After the use of a denture adhesive, dentures will hold in place for every denture wearer, regardless of his or her particular denture holding problem, when the wearer eats any of the aforementioned "problem" foods.

5. As referred to herein, the term reasonable basis may consist of an opinion, where appropriate, in writing signed by a person qualified by education or experience to render the opinion that a competent scientific test(s) or other objective data exist; *provided, however,* that such opinion also discloses and describes the contents of such test(s) or other objective data.

It is further ordered, That the respondent corporation shall

forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent submit to the Commission, in writing, a compliance report detailing the manner and form in which it complied with this order. Such reports shall be submitted sixty (60) days after the entry of a final order and, thereafter, annually for two (2) years from the date of the first submission.

In addition, any provision of this order shall abate when inconsistent with a final Federal Trade Commission trade regulation rule if the trade regulation rule specifically authorizes any claim prohibited herein.

IN THE MATTER OF

SUNKIST GROWERS, INC.

Docket 9100. Interlocutory Order, Nov. 17, 1978

ORDER DENYING REQUEST FOR REIMBURSEMENT OF REPRODUCTION EXPENSES

The administrative law judge has certified to the Commission respondent's request for payment of costs incurred pursuant to reproduction of documents produced in response to a subpoena *duces tecum* issued on February 17, 1978. That subpoena called for production of certain documents in Sunkist's possession for inspection and copying by complaint counsel. Return of the subpoena was ordered to be made in Los Angeles and Sunkist apparently offered to undertake the photocopying of those documents identified by complaint counsel. There is some dispute, however, over whether or not complaint counsel offered to reimburse respondent for its efforts. Sunkist contends that complaint counsel agreed that Sunkist was to be reimbursed for the copying and that $.10 per page was a reasonable charge.[1] Complaint counsel affies that he agreed only that it was reasonable for Sunkist to request reimbursement of reproduction expenses from the Commission, and that he made clear to Sunkist's counsel that only the Commission could authorize reimbursement.

The Commission Rules make no provision for payment of reproduction expenses incurred by a respondent in connection with a Commission proceeding. Moreover, service contracts involving the expenditure of agency funds must be executed by an individual possessing authority to enter into a contract on behalf of the Commission.[2] Thus, assuming *arguendo* that complaint counsel did enter into an otherwise proper contract with respondent's counsel, the law is clear that the Commission is not bound by the unauthorized acts of its employees.[3] Accordingly,

It is ordered, That respondent's motion is denied.

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[1] It appears from the affidavit filed by respondent's counsel that Sunkist first suggested that the copying be done on its facilities and that complaint counsel agreed with this suggestion.

[2] Under Federal Procurement Regulation § 1.404-2, 41 C.F.R. 1.404-2 (1977), each agency designates its contracting officials. *See The Federal Trade Commission Procurement and Contracting Guidelines,* June, 1978.

[3] *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."; *Albrechtsen* v. *Andrus,* 570 F.2d 906 (10th Cir. 1978)).

IN THE MATTER OF

16 CFR 461; CHILDREN'S ADVERTISING. 43 FR 17967 (1978)

TRR 215-60. Interlocutory Order, Nov. 17, 1978

ORDER DENYING PETITIONS TO RECONSIDER

The Commission has before it, upon certification by the presiding officer, three petitions[1] urging that it suspend proceedings in this matter and reconsider all actions previously taken by the Commission herein. A fourth petition requests that the proceedings be delayed and that the presiding officer step aside or be removed by the Commission.[2] The petitions have been filed in light of the decision of the District Court in *Association of National Advertisers, Inc., et al.* v. *Federal Trade Commission, et al.,* No. 78-1421 (November 3, 1978), ordering that Chairman Pertschuk cease further participation in this proceeding.

Except to the extent noted herein, the petitions are denied for the following reasons:

1. As a preliminary matter, we note that the District Court did not order that the Commission take the action requested by petitioners in order to eliminate the "taint" believed by the Court and petitioners to result from the Chairman's participation, nor does it appear to the Commission that the Court was of the view that action of this sort might be necessary. In ordering that the Chairman withdraw from further participation, the Court concluded that its immediate intervention was required because "*continued* participation of the Chairman would render the proceedings void and so irrevocably tainted that any final determinations which might flow from such proceedings would be invalid" (Opinion, p.5, emphasis added.) In resolving only to order disqualification of the Chairman, the Court had before it plaintiffs' prayer that it suspend and order reconsideration of the entire proceeding. Complaint Prayer ¶4, p.7. The Court did not grant the requested relief. Accordingly, we reject any suggestion that reconsideration of our decision or modification of

[1] "The Chocolate Manufacturers Association's Petition to Reconsider the Proposal and Procedures Previously Announced for this Proceeding in Light of the Disqualification of the Chairman;" "Petition for Reconsideration and Redetermination of the Decision to Commence the Children's Advertising Trade Regulation Rule Proceeding and of All Decisions Made Subsequent Thereto in Which the Chairman Participated and for Postponement of Proceedings," filed by American Association of Advertising Agencies, Association of National Advertisers, Inc., American Advertising Federation, Toy Manufacturers of America, Inc., Association of Independent Television Stations, Inc., and National Association of Broadcasters; "Kellogg Company's Petition to Rescind and Withdraw the Initial Notice of Proposed Rulemaking, and to Reconsider All Matters Which the Commission has Previously Decided in Connection with this Proceeding, in Light of the Disqualification of the Chairman."

[2] "GMA Motion for Extension of Deadline and Notice of Cause to Believe that Grounds Exist for Disqualification of Presiding Officer."

the proceedings in any way is necessary as a matter of law to cure any injury that may be thought to have occurred or been threatened by the Chairman's participation in this matter.

2. The foregoing notwithstanding, members of the Commission have *sua sponte* given considerable thought to the questions raised by petitioners since the District Court's ruling was issued on November 3, 1978. Having done so, it is the Commission's view that there exists no basis for modification of any of the Commission's earlier decisions in this matter, and that the public interest would best be served by continuation of this proceeding along the course previously set forth, without delay.

The determination to commence this rulemaking proceeding, and subsequent procedural determinations along the way, have all been made by the unanimous vote of the Commission, based upon the independent judgment of each Commissioner. *De novo* reconsideration of these issues has not led any of the Commissioners now participating in this matter to conclude that a different course of action should have been, or should now be taken. In particular, upon *de novo* reconsideration the Commission is of the view that the material presented by its staff indicates that certain advertising directed to children may be deceptive or unfair within the meaning of Section 5 of the Federal Trade Commission Act, and that the public interest would best be served by consideration of these possible violations of law and possible remedies thereto as set forth in detail in the Commission's Notice of Proposed Rulemaking, 43 F.R. 17967, *et seq.* To be sure, members of the Commission are not without significant reservations about portions of its staff's contentions, as were detailed in statements issued by individual Commissioners at the time this rulemaking proceeding was commenced, as well as in the questions raised in the Notice of Proposed Rulemaking. The manner in, and extent to which these reservations and other issues are addressed in the rulemaking proceeding will determine whether a rule should issue in this matter and, if one does, what its terms should be. Notwithstanding these reservations, however, it was the determination of each Commissioner in April 1978, and upon *de novo* reconsideration, it remains the determination of the Commission that a rulemaking proceeding is legally warranted and in the public interest.

The Commission has also reconsidered, and finds no reason to disturb, procedural determinations announced in the Notice of Proposed Rulemaking and subsequent to the institution of the

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rulemaking proceeding.[3] In particular, with respect to the choice of a presiding officer, which was made by the Chairman, it should be noted that this was done with the approval of the other Commissioners. It is now the *de novo* determination of the Commission, without the participation of the Chairman, that Mr. Needelman was and is appropriately designated and is well-qualified to preside in this matter, and should continue to preside. Having reviewed the allegations of the parties and Mr. Needelman's certifications in response thereto, the Commission finds no reason whatsoever to question the impartiality or appearance thereof with which Mr. Needelman has addressed the issues presented to him, and the Commission has complete confidence that he will address issues that arise in the future in similar fashion.

For the foregoing reasons, *it is ordered,* That the petitions to reconsider are granted insofar as they request *de novo* reconsideration of the rulings previously made by the Commission in this proceeding. In all other respects the petitions are denied. Upon said *de novo* reconsideration, the previous actions of the Commission, including designation of the presiding officer, are reaffirmed and it is directed that the rulemaking proceeding shall proceed as scheduled.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

[3] These include:

a. The procedures set forth in the Federal Register notice of April 27, 1978.
b. Order Denying Chocolate Manufacturer's Petition (July 31, 1978).
c. Order Denying Various Petitions (July 31, 1978).
d. Approval of Investigational Resolution, Unnamed Firms Engaged in Children's Advertising, File No. 782-3055 (April 4, 1978), and the closing of the earlier investigation, File No. 762-7037 (September 12, 1978).
e. Appointment of Morton Needelman as Presiding Officer.

IN THE MATTER OF

SEARS, ROEBUCK AND CO., ET AL.

Docket 9104. Interlocutory Order, Nov. 22, 1978

ORDER REJECTING CERTIFICATION AND DENYING MOTION TO STAY PROCEEDING

Respondent Sears, Roebuck and Co. (Sears) on September 25, 1978 moved before the administrative law judge (ALJ) for an order certifying a consent agreement executed by Sears but not agreed to by complaint counsel. By order of November 7, 1978, the ALJ certified the consent agreement to the Commission expressing the belief that the proposed consent order should be brought to the attention of the Commission because it raised a "law enforcement policy matter beyond the province of the law judge which only the Commission can properly evaluate." Although complaint counsel asserts that this language fails to meet the mandate of Rule 3.25(b), requiring that the law judge find a likelihood of settlement before certifying such orders to the Commission, we believe that a fair reading of the certification as a whole reflects the ALJ's conclusion that resolution of the proceeding on the basis of the proffered order is likely.[1]

Respondent's settlement proposal differs from the notice order attached to the complaint in that it is limited in coverage to dishwashers, the performance of which was allegedly misrepresented by respondent. By contrast, the notice order applies to "major home appliances" which "includes (but is not limited to) air conditioning units (room or built-in); clothes washers; clothes dryers; disposers; dishwashers; trash compactors; refrigerators; refrigerator/freezers; freezers; ranges, stoves, and ovens, stereophonic consoles and nonportable stereophonic sound systems and components; television receivers; and room humidifiers and dehumidifiers." [Notice Order, Part II, 5.] Additionally, the proposed agreement filed by Sears requires the Commission to act on a motion to modify the consent order within certain time periods if the Commission promulgates a trade regulation rule or guide concerning the practices covered by the order and where the rule or guide is less restrictive than the order.

[1] We would point out, however, that the law judge is within his authority to comment on the adequacy of any proposed settlement in light of the evidence presented in the case as well as outstanding orders of a similar nature involving other respondents. The ALJ's analysis of particular order provisions in the context of a certification under Rule 3.25(d) (irrespective of whether those provisions are addressed to specific violations of record or offered as "fencing-in" provisions) is not dramatically different from the analysis which the ALJ must perform when he considers the issue of relief in the course of his initial decision.

Given the significance of effective relief, the Commission is unwilling to conclude that the circumstances of this matter, which is now in the midst of trial, warrant no relief beyond the "single product" order proposed by Sears.[2] While respondent, of course, has not been adjudicated in violation of Section 5, we believe it is important to reiterate the prevailing standard for relief, as noted in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394 (1965), a case in which the Court declined to modify an "all products" order:

> [t]he propriety of a broad order depends upon the circumstances of the case, but the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist. . . . Having been caught violating the Act, respondents "must expect some fencing in." (Citation omitted.)

Since this matter will not be withdrawn from adjudication, there is no need to delay conclusion of the administrative proceeding. Accordingly,

It is ordered, That the certification is rejected and that respondent's motion for a stay of the proceedings is denied.

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[2] The Commission disagrees with respondent's reading of the consent order entered in *General Electric Co.*, Dkt. 9049. Part I of that order requires respondent, *inter alia*, to have a reasonable basis with respect to certain performance representations when utilized in connection with the advertising of some twelve different categories of household products, including dishwashers. Yet, the complaint in that matter challenged these practices only in the context of advertising for color television sets. Similarly, Part II of the consent agreement accepted on October 20, 1978, in *Norris Industries*, File 782 3065, [Decision and Order, 92 F.T.C. 989] contains a "reasonable basis" requirement for representations relating to the performance of major home appliances, as defined in the order to include dishwashers, garbage disposers, trash compactors, and microwave ovens, despite the fact that the complaint recites alleged unfair and deceptive practices associated only with the advertising and sale of dishwashers.

IN THE MATTER OF

CORNING GLASS WORKS, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2937. Complaint, Nov. 27, 1978 — Decision, Nov. 27, 1978

This consent order, among other things, requires a Corning, N.Y. manufacturer and distributor of disposable glass culture tubes to make a bona fide effort to identify and provide proper restitution to eligible end-user customers who had failed to receive the amount of disposable glass tubes specified on packaging.

Appearances

For the Commission: *David C. Cameron.*
For the respondent: *Stephen C. Taylor,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Corning Glass Works, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Corning Glass Works is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Houghton Park, Corning, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, distribution, and sale of disposable glass culture tubes.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now maintains, and at all times mentioned herein has maintained, a substantial course of trade in its aforesaid products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its aforesaid products, respondent has made, and is now making, various statements and representations on boxes, cartons, or packages containing such products and on invoices relating to the delivery or sale of such products to purchasers or prospective purchasers with respect to the

number of units of such products contained in the said boxes or other containers.

PAR. 5. By and through the use of such statements and representations, respondent has represented, directly or by implication, that each of the aforesaid boxes, cartons, or packages contain not less than one thousand (1000) useable units of the said products.

PAR. 6. In truth and in fact, certain of the aforesaid boxes, cartons, or packages contain less than one thousand (1000) useable units of the said products.

Therefore, the statements referred to in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and is now in substantial competition, in or affecting commerce, with corporations, firms, and individuals in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices, has had the capacity and tendency to mislead purchasers and consumers (1) into the erroneous and mistaken belief that said statements and representations were and are true and (2) into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by

respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Corning Glass Works is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Houghton Park, Corning, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Corning Glass Works, a corporation, its successors and assigns, and its officers, agents, representatives and employees, in connection with the manufacture, distribution or sale of disposable glass culture tubes in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to:

1. Make a *bona fide* effort, with the voluntary cooperation of each of its dealers, to identify all purchases of disposable glass culture tubes manufactured by respondent in sizes 10 x 75, 12 x 75 and 13 x 100 mm, by each such dealer's end-user customers between January 1, 1974, and December 31, 1975.

2. Make a refund to each person, partnership or corporation so identified as an end-user purchaser of the said products by (a) delivering or causing to be delivered a quantity of disposable culture tubes equal to 2.5% of the total of such tubes purchased by such end-user purchaser, (b) paying an amount of money equal to 2.5% of the total price paid for such tubes by such end-user purchaser, or (c) a combination of said methods, at respondent's option.

3. At or prior to the time of making the refund under 2., above, send to each such recipient of a refund, an announcement worded

substantially as set forth in Appendix A hereto, or in such other form as may be approved by the Regional Director of the Commission's Los Angeles Regional Office.

II

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

III

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in respondent which may affect compliance obligations arising out of the order.

IV

It is further ordered, That the respondent herein shall within ninety (90) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

Dear Customer:

(Date)

Following investigation by the Federal Trade Commission, Corning Glass Works had reason to believe that certain packages of Disposable Culture Tubes sold by us between September 1973 and the Fall of 1975 contained fewer tubes than the quantity specified. Several factors may have contributed to this situation including human error on our packing lines, slight variations in the tube diameter and our high speed manufacturing process. Fortunately, a careful audit of our Disposable Culture Tube packages, conducted by our Quality Assurance people, indicated that the potential shortages were relatively small and that such shortages were limited to only 3 sizes - 10 x 75, 12 x 75 and 13 x 100 mm. After learning of this problem and studying its causes, we took corrective action by changing to a slightly larger package in September 1975 and turning to an entirely different packaging concept early in 1976.

The above is Corning's version of the facts in this matter and has not been approved or adopted by the Commission or its staff.

We sincerely regret that this problem arose and wish to assure you that Corning Glass Works will strive to provide products of the highest quality and dependability at all times. Because of the impossibility of determining which customers may have purchased merchandise affected by this problem, we have voluntarily agreed with the Federal Trade Commission to make an across-the-board refund of 2.5% of your purchases of these tubes during the years 1974 and 1975. [Enclosed is a check for _____ representing your purchases of such products from *(dealer's*

name) during 1974 and 1975. If you purchased these sizes of tubes from more than one dealer, you may be receiving more than one separate check in the mail.][1]

If you have any questions you may write directly to Edmund M. Olivier, Vice-President and General Manager, Science Products Division, Corning Glass Works; Corning, New York 14830 or call (607) 974-4126. We hope you feel we have compensated you for any shortage you may have experienced.

Very truly yours,
R. Michael Worley
Marketing Manager
Disposable Glassware

[1] [alternative language to that in brackets above:]
You will be receiving a shipment of tubes within the near future which represents 2.5% of your purchases from *(dealer's name)* during the years 1974 and 1975. If you purchased these sizes of tubes from more than one dealer you may receive more than one glass shipment.

IN THE MATTER OF

OWENS-ILLINOIS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2938. Complaint, Nov. 27, 1978 — Decision, Nov. 27, 1978

This consent order, among other things, requires a Toledo, Ohio manufacturer and distributor of disposable glass culture tubes to make a bona fide effort to identify and provide proper restitution to eligible end-user customers who had failed to receive the amount of disposable glass tubes specified on packaging.

Appearances

For the Commission: *David C. Cameron.*
For the respondent: *Alan C. Boyd,* Toledo, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Owens-Illinois, Inc., a corporation trading and doing business under its own name and as Kimble Division of Owens-Illinois, Inc., hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Owens-Illinois, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, trading and doing business under its own name and as Kimble Division of Owens-Illinois, Inc., with its principal office and place of business located at the Owens-Illinois Building, Madison Ave., Toledo, Ohio.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, distribution, and sale of disposable glass culture tubes.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now maintains, and at all times mentioned herein has maintained, a substantial course of trade in its aforesaid products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its aforesaid products, respondent has made, and is now making, various statements and

representations on boxes, cartons, or packages containing such products and on invoices relating to the delivery or sale of such products to purchasers or prospective purchasers with respect to the number of units of such products contained in the said boxes or other containers.

PAR. 5. By and through the use of such statements and representations, respondent has represented, directly or by implication, that each of the aforesaid boxes, cartons, or packages contain not less than one thousand (1000) useable units of the said products.

PAR. 6. In truth and in fact, certain of the aforesaid boxes, cartons, or packages contain less than one thousand (1000) useable units of the said products.

Therefore, the statements referred to in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and is now in substantial competition, in or affecting commerce, with corporations, firms, and individuals in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices, has had the capacity and tendency to mislead purchasers and consumers (1) into the erroneous and mistaken belief that said statements and representations were and are true and (2) into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by

the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Owens-Illinois, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, trading and doing business under its own name and as Kimble Division of Owens-Illinois, Inc., with its principal office and place of business located at the Owens-Illinois Building, Madison Ave., Toledo, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Owens-Illinois, Inc., a corporation trading and doing business under its own name, as Kimble Division of Owens-Illinois, Inc., or under any other name or names, its successors and assigns, and its officers, agents, representatives and employees, in connection with the manufacture, distribution or sale of disposable glass culture tubes in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to:

1. Make a *bona fide* effort, by soliciting the voluntary cooperation of each of its dealers, to identify all purchases of disposable glass culture tubes, except the 6 x 50 mm size, manufactured by respondent, by each such dealer's end-user customers between April 1, 1974, and December 31, 1975.

2. Make a refund to each person, partnership or corporation so identified as an end-user purchaser of the products referred to in 1.,

above, by (a) delivering or causing to be delivered a quantity of disposable culture tubes equal to 0.75% of the total of such tubes purchased by such end-user purchaser during such period; (b) paying an amount of money equal to 0.75% of the total price paid for such tubes by such end-user purchaser, if such price information is obtainable from the dealer (otherwise, such refund shall be based upon respondent's suggested consumer prices during such period; for this purpose a customer's purchase of tubes of a particular size for each time period shown on the records furnished by the dealer shall be deemed to be a single shipment); or (c) a combination of said methods, at respondent's option.

3. At or prior to the time of making the refund under 2., above, send to each such recipient of a refund, an announcement worded substantially as set forth in Appendix A hereto.

II

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

III

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in respondent to the extent that any such change may affect compliance obligations arising out of the order.

IV

It is further ordered, That the respondent herein shall within ninety (90) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

APPENDIX A

Dear Customer:

(Date)

Our Kimble disposable glass culture tubes are packaged in trays designed to hold 250 or 125 tubes each (depending on tube size), then boxed four trays to a carton. Following investigation by the Federal Trade Commission, it has been discovered that during the period from April 1, 1974, to December 31, 1975, because of our high-speed packing methods, a misalignment of the tubes could result in a count of fewer than 250, or 125, tubes, depending on size, in one or more of the four inner trays in a

particular carton. Since such discovery was made we have taken appropriate corrective action.

The above is O-I's version of the facts in this matter and has not been approved or adopted by the Commission or its staff.

We sincerely regret that this problem arose and wish to assure you that Owens-Illinois, Inc. will strive to provide products of the highest quality and dependability at all times. Because of the impossibility of determining which customers may have purchased merchandise affected by this problem, we have voluntarily agreed with the Federal Trade Commission to make an across-the-board refund of 0.75% of your purchases of these tubes during the period from April 1, 1974, through December 31, 1975.

[Enclosed is a check for _____ representing 0.75% of your purchases of such products from *(dealer's name)* during such period. If you purchased these sizes of tubes from more than one dealer, you may be receiving more than one separate check in the mail.][1]

[1] [alternative language to that in brackets above:]

You will be receiving a shipment of tubes within the near future which represents 0.75% of your purchases from *(dealer's name)* during such period. If you purchased these sizes of tubes from more than one dealer you may receive more than one glass shipment.

If you have any questions you may write directly to Mr. E. W. Metz, Owens-Illinois, Inc., P. O. Box 1035, Toledo, Ohio 43666 or call (419) 242-6543. We hope you feel we have compensated you for any shortage you may have experienced.

Very truly yours,

IN THE MATTER OF

CAPAX, INC. - DOCKET D. 9058
TRANS-AMERICAN COLLECTIONS, INC. - DOCKET D. 8901
UNITED COMPUCRED COLLECTIONS INC. - DOCKET C-2906
TRANS NATIONAL CREDIT CORPORATION - DOCKET C-2806
CONTINENTAL COLLECTION BUREAU OF AMERICA, INC. - DOCKET C-2808
NORTH AMERICAN COLLECTIONS, INC. - DOCKET C-2809
POWER'S SERVICE, INC. - DOCKET C-2810
CONTINENTAL COLLECTION SERVICE - DOCKET C-2811

Interlocutory and Modifying Orders, Nov. 28, 1978

This order denies a petition of Capax, Inc. requesting reconsideration of its order issued on May 25, 1978, 91 F.T.C. 1048, 43 FR 27782. Additionally, the order reopens and modifies, by deleting the disclosure requirement, the order issued on September 26, 1973 in Dkt. D. 8901, 83 F.T.C. 525, 38 FR 28933; and the orders issued on March 11, 1976 in Dkt. C-2806, 87 F.T.C. 542, 40 FR 19206; C-2807, 87 F.T.C. 549, 40 FR 19205; C-2808, 87 F.T.C. 557, 40 FR 19202; C-2809, 87 F.T.C. 566, 40 FR 19203; C-2810, 87 F.T.C. 574, 40 FR 19204; and C-2811, 87 F.T.C. 582, 40 FR 19201.

ORDER DENYING PETITION FOR RECONSIDERATION OF FINAL ORDER OR REOPENING OF PROCEEDING IN DOCKET NO. 9058 AND REOPENING AND MODIFYING FINAL ORDERS IN DOCKET NOS. 8901 AND C-2806 - C-2811

On May 25, 1978, the Commission issued its final order and opinion in *Capax, Inc.* The Commission held that respondents had engaged in certain misrepresentations in the course of their service to assist creditors in the collection of alleged delinquent debts, and prohibited these misrepresentations in its final order. The Commission rejected complaint counsel's request that respondents be required to provide an affirmative disclosure[1] in each communication sent to alleged debtors, stating:

[W]e do not consider the affirmative disclosure sought here by complaint counsel to be necessary, under the circumstances of this case, in light of the order's ample prohibitions on misrepresentations. Moreover, we believe that the proposed disclaimer could lull recipients into a false sense of security by giving them the impression that failure to pay the claimed debt will not result in legal action or harm to their credit standing. Because creditors might pursue an alleged delinquent debt by bringing suit or could report the matter to a consumer reporting agency, debtors who

[1] "We are an independent company employed by your creditor solely for the purpose of reminding you of your outstanding obligation. We are not authorized to engage in typical debt collection activity, to institute suit or to take any action which may affect your credit rating."

decided not to make payment on the basis of the disclaimer could suffer harm. Therefore, our order will not include the proposed affirmative disclosure.

Previously, the Commission had ordered disclosures similar to that sought by complaint counsel in *Trans-American Collections, Inc.*, Dkt. D. 8901, 83 F.T.C. 525 (1973); *United Compucred Collections, Inc.*, Dkt. C-2806, 87 F.T.C. 542 (1976); *Trans National Credit Corp.*, Dkt. C-2807, 87 F.T.C. 549 (1976); *Continental Collection Bureau of America, Inc.*, Dkt. C-2808, 87 F.T.C. 557 (1976); *North American Collections, Inc.*, Dkt. C-2809, 87 F.T.C. 566 (1976); *Power's Service, Inc.*, Dkt. C-2810, 87 F.T.C. 574 (1976); and *Continental Collection Service*, Dkt. C-2811, 87 F.T.C. 582 (1976). On the date of issuance of the final order and opinion in *Capax*, the Commission issued orders to show cause why the above-cited orders should not be modified to delete the mandated affirmative disclosures, pursuant to Commission Rule 3.72(b). In its orders to show cause, the Commission stated that the reasoning articulated in *Capax* for rejecting complaint counsel's request for an affirmative disclosure may be equally applicable to the above-cited orders and that their requirement of an affirmative disclosure should be reconsidered.[2]

Complaint counsel have petitioned for reconsideration of the Commission's order in *Capax* pursuant to Rule 3.55, or in the alternative, for reopening of the proceeding in order to modify the Commission's decision not to require Capax to use an affirmative disclosure in its communications, pursuant to Rule 3.72. In support of their petition, complaint counsel argue that (1) since the Fair Debt Collection Practices Act became effective on March 20, 1978, "many complaints have been received pointing out the inherently deceptive nature of dunning letters sent by flat rate letter writing services," (2) an affirmative disclosure requirement is necessary to avoid the deception most certain to occur in the use of dunning notices, and (3) insertion of a modified version of the affirmative disclosures proposed in complaint counsel will prevent any misleading impression.

In a separate pleading, the Bureau of Consumer Protection has filed an opposition to the modification of the orders in Dkts. D. 8901 and C-2806 - C-2811 pending determination of complaint counsel's petition in *Capax*.

Counsel for Capax have filed an answer opposing complaint counsel's petition for reconsideration or reopening. That petition has also been opposed by counsel for Trans World Accounts, another

[2] In its opinion in *Capax*, the Commission noted that "(t)he appropriateness of those disclosures depends upon the facts of each case, including the prescribed language and the details of the firm's operations and authority."

company which provides debt collection services and which is an appellant from a final Commission order.

Trans-American Collections and the other respondents in Dkt. D. 8901 have filed a response to the order to show cause, expressing their acceptance of the proposed modification to the order in that matter. Powers Service and Community Systems, respondents in Dkt. C-2810, have filed a motion requesting the Commission to modify the consent order in accordance with the order to show cause. None of the other respondents who received the show cause orders has filed a response.

Although the Commission does not have authority to modify the order in *Capax* at this time,[3] either in response to a petition for reconsideration or for reopening, we will address the substance of complaint counsel's arguments, since this issue is central to the orders to show cause which are opposed by the Bureau of Consumer Protection. The Commission finds that the pleadings do not raise material issues of fact, and therefore will decide the matters on the orders to show cause and answer thereto, in accordance with Rule 3.72(b)(3).

Complaint counsel argue that since the effective date of the Fair Debt Collection Practices Act, many complaints have been received indicating that dunning letters sent by flat rate letter debt collection services are inherently deceptive. According to complaint counsel, the majority of consumers are unaware that in most cases such services have "virtually no authority to proceed with what is commonly understood to be normal collection efforts," and an affirmative disclosure such as that proposed is necessary to avoid deception. The Commission has never found that third party collection letters are inherently deceptive, and has no basis for making any such finding now. We see no reason to depart from our determination that the prohibitions on misrepresentations contained in the *Capax* order render an affirmative disclosure unnecessary. Under the order, Capax is prohibited from misrepresenting (1) the urgency of any communication, (2) its authority to engage in certain kinds of debt collection activity, (3) the likelihood of legal action, (4) the effect of nonpayment upon a debtor's credit record, and (5) the imminency of any action that may or will be taken. A prohibition upon these misrepresentations will eliminate the deception found by the Commission in *Capax*. Similar prohibitions are contained in the consent orders subject to the orders to show cause.

The Fair Debt Collection Practices Act, which became effective on

[3] 15 U.S.C. 45(b).

March 20 of this year, is relied upon by complaint counsel as a basis for reconsideration. That Act was fully taken into account in the Commission's determination, and presents no new question. The operation of that Act provides even less reason to mandate any affirmative disclosure than before, due to the requirement imposed upon debt collectors to provide a prescribed written notice within five days after the initial communication with a consumer and the requirement to cease collection of a debt after notification by the consumer. Section 809, 15 U.S.C. 1692g.

The Commission expressed concern in *Capax* that the affirmative disclosure proposed by complaint counsel may lull consumers into a false sense of security by giving them the impression that failure to pay the claimed debt will not result in legal or other action by the creditor. To remedy this possible misimpression, complaint counsel now propose the the following sentence be added to the disclaimer: "The creditor is permitted to take whatever action is available under State law." While this modification may be helpful, we nevertheless believe that no additional disclosure is necessary.

Accordingly, *it is ordered,* That:

1) The petition requesting reconsideration of reopening of the proceeding in *Capax,* Dkt. D. 9058, be denied;

2) The final order in Dkt. D. 8901 is reopened and modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

> This communication is only a reminder notice. Trans-American Collections, Inc., cannot accept monies nor will it take any action, legal or otherwise, regarding this claim.

3) The final order in Dkt. C-2806 is reopened and modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

> This communication is a reminder of creditor's claim. United Compucred Collections, Inc., does not accept payment. United Compucred Collections, Inc., does not ordinarily file suit.

4) The final order in Dkt. C-2807 is modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

> This communication is a reminder of creditor's claim. Trans National Credit Corporation does not accept payment. Trans National Credit Corporation does not ordinarily file suit.

5) The final order in Dkt. C-2808 is modified by deleting the

requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is a reminder of creditor's claim. Continental Collection Bureau of America, Inc., does not accept payment. Continental Collection Bureau of America, Inc. does not ordinarily file suit.

6) The final order in Dkt. C–2809 is modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is a reminder of creditor's claim. North American Collections, Inc., does not accept payment. North American Collection, Inc. does not ordinarily file suit.

7) The final order in Dkt. C–2810 is modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is only a reminder notice. Power's Service, Inc. cannot accept payment nor will it take legal action regarding this claim.

8) The final order in Dkt. C–2811 is modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is a reminder of creditor's claim. Continental Collection Service does not accept payment. Continental Collection Service does not ordinarily file suit.

IN THE MATTER OF

ADVERTISING FOR OVER-THE-COUNTER ANTACIDS

TRR 215-56. Interlocutory Order, Nov. 30, 1978

ORDER AFFIRMING THE PRESIDING OFFICER'S FINAL NOTICE

The Commission, having received pursuant to Rule 1.13(c) (2)(ii) a petition from the Proprietary Association appealing from the designation of issues in the presiding officer's final notice of proposed rulemaking, hereby affirms the decision of the presiding officer. In the final notice, 43 F.R. 38849 (August 31, 1978), the presiding officer declined to designate any issues for cross-examination pursuant to Rule 1.13(d)(1). Instead, he propounded seven questions to which the attention of all interested persons was directed.

The Commission agrees that none of the issues proposed for designation meets the standard of Rule 1.13(d)(1)(i) because they are not disputed issues of material fact that are necessary to resolve, within the meaning of 15 U.S.C. 57a(c)(1)(B). Nevertheless, as an exercise of its discretion and in an attempt to create as complete a record as possible, the Commission has directed the presiding officer to afford ample opportunity for cross-examination on the important issues raised in this proceeding.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Nov. 30, 1978

ORDER DENYING MOTION TO DISQUALIFY

Respondents Kellogg Company and General Mills, Inc., have moved that Chairman Pertschuk disqualify himself, or alternatively, that the Commission determine that he is disqualified from participating in any proceeding in this matter. In response, Chairman Pertschuk has filed a memorandum declining to disqualify himself from the proceedings and setting forth the reasons therefor.

Upon consideration of respondents' motions and the Chairman's memorandum, the Commission has determined that no grounds exist for granting the requested relief. Accordingly,

It is ordered, That respondents' motions to disqualify be, and the same hereby are, denied.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

MEMORANDUM OF CHAIRMAN PERTSCHUK IN RESPONSE TO MOTION TO DISQUALIFY HIM FROM PARTICIPATION IN THIS PROCEEDING

Respondents Kellogg Company ("Kellogg") and General Mills, Inc. ("General Mills") have filed motions asking that I disqualify myself, or that the Commission determine that I am disqualified, from further participation in this proceeding. For the reasons stated below I believe my participation in this case is proper, and decline to disqualify myself.

In support of their contention that I have made statements creating the appearance of partiality and prejudgment in this matter, Kellogg and General Mills rely on a quote from the Battle Creek Enquirer and News, June 24, 1977, at B1, col.1 (Connelly Aff. ¶2; Savarese Aff. ¶3). There, in an article published under the byline of the Gannett News Service, I am reported to have said:

> [W]inning the cereal case would "be an enormous help. . . It just depends how you win it, what you win, what kind of remedy you fashion."

The references to "winning the cereal case" appear outside the quotation marks,[1] which squares with my recollection of the interview which gave rise to the article. My recollection of the substance of the quote is that I was referring to the "big case" generically.[2] I recall no use of the term "winning" and was solely concerned with structuring cases to see that they were shaped for trial with a carefully fashioned remedy in mind.

Taken as a whole, the article reflects my own general attitude toward the "big case" approach to antitrust problems. My recollection is that the more accurate form of the above quote would have been "appropriately crafted structural cases can 'be an enormous help. . .' " I did not then, and do not now, have any opinion as to the outcome of the *Kellogg, et al.,* litigation.

In each instance in which a court has disqualified agency decisionmakers, that action has been based on comments showing what would appear to a disinterested observer as a viewpoint or prejudice concerning specific controverted factual issues, *e.g., American Cyanamid Co.* v. *FTC,* 363 F.2d 757, 767 (6th Cir. 1966), or the ultimate issue of liability, *e.g., Texaco Inc.* v. *FTC,* 336 F.2d 754, 760 (D.C. Cir. 1964); *Cinderella Career & Finishing Schools* v. *FTC,* 425 F.2d 583, 590 (D.C. Cir. 1970), in a pending adjudicative matter. My comments reflect no such commitment with respect to this case. See *Kennecott Copper Corp.* v. *FTC,* 467 F.2d 67, 80 (10th Cir. 1972). They can at most be read as reflecting an underlying philosophy or policy favoring effective enforcement of the antitrust laws, which would not be ground for disqualification. Cf. *American Cyanamid Co.* v. *FTC, supra,* 363 F.2d at 764.

The motions also cite numerous other statements that allegedly reflect hostility toward respondents or bias as to issues involved in this proceeding. See Connelly Aff. ¶¶3-6; Savarese Aff. ¶¶4-7. The cited statements concern the content of television commercials, their effect on children, and the effects of advertising that stimulates brand name identity and product differentiation. These remarks reflect my views on issues of law, policy, or legislative fact, which are not grounds for disqualification. See, *e.g., Laird* v. *Tatum,* 409 U.S. 924, 839 (1972)(memorandum of Rehnquist, J.); *FTC* v. *Cement Institute,* 333 U.S. 683, 700-03 (1948); *United States* v. *Morgan,* 313 U.S. 409, 421 (1941); 2 K. Davis, Administrative Law, §12.01, at 144.

[1] General Mills' motion erroneously creates the impression that those words were part of my quotation. Savarese Aff. ¶3. I have referred to the actual Enquirer and News article to verify the quote as it appears in this memorandum.

[2] In fact, the same article states that I declined to comment on specific aspects of the "cereal case."

They do not touch upon specific factual issues raised in the pleadings or the ultimate issue of liability.[3]

A third category of statements relied on in the motions to disqualify concern my professed irritation with the requirement that I not prejudge matters on which I must sit as judge. See Connelly Aff. ¶8; Savarese Aff. ¶8. Those statements bear no relation to this case. Moreover, I believe the statements, read in context, reflect my fidelity to the rule that I refrain from passing judgment on pending matters, no matter how frustrating I may find that rule to be.

Finally, Kellogg cites (Connelly Aff. ¶7) a statement of mine in which I described a meeting with Kellogg's President as "a frank and open exchange of views — in the words of cold war diplomacy. . . ." It should be clear to any reader of that statement that the words were used facetiously and do not reflect a personal animus toward Kellogg.

I reiterate that I have not arrived at any conclusions regarding the issues in this case, and will not do so until it is properly before me. Accordingly, I decline to disqualify myself from further participation in the proceeding.

[3] See also my letter to Gilbert H. Weil, Esq., dated July 13, 1978, responding to a petition to disqualify me in the Children's Advertising Rulemaking proceeding, which discusses these issues in greater detail.

IN THE MATTER OF

VITAL-E T/A MAIL ORDER SERVICES, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9082. Complaint, May 11, 1976 — Decision, Nov. 30, 1978

This consent order, among other things, requires a Tarzana, Calif. mail order company and its advertising agency to cease disseminating advertisements which misrepresent that any dietary drug, plan or device will cause weight loss without exercise or caloric restriction; or that any vitamin supplement, food or drug will eliminate adverse skin conditions, stop or reverse the aging process, or enhance sexual potency. The firms are further required to disclose health or cosmetic risks posed by products; offer refunds for products that pose such risks; and furnish substantiation for all claims regarding product performance, safety and efficacy. Additionally, the order prohibits the firms from misrepresenting product sources, or government association.

Appearances

For the Commission: *Kendall H. MacVey* and *Robert J. Enders.*

For the respondents: *Richard M. Crane* and *Milton Linder,* Beverly Hills, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Vital-E, a corporation trading and doing business under its own name and as Mail Order Services; Advertising Unlimited of America, Inc., a corporation trading and doing business as Normond Linder & Associates; Milton Kalman, individually and as an officer of corporate respondent Vital-E; Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, individually and as an officer of corporate respondent Vital-E; and Normond Linder, individually and as an officer of corporate respondent Vital-E and as an officer of corporate respondent Advertising Unlimited of America, Inc., with all the aforementioned having done and doing business under various fictitious trade names, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent Vital-E is a corporation organized, existing, and doing business under and by virtue of the laws of the State of

California, trading and doing business under its own name and as Mail Order Services, with its principal office and place of business located at 18588 Ventura Boulevard, Tarzana, California.

Respondent Advertising Unlimited of America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, trading and doing business as Normond Linder & Associates, with its principal office and place of business located at 12400 Santa Monica Boulevard, Los Angeles, California.

Respondents Milton Kalman, Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, and Normond Linder are individuals and are officers of corporate respondent Vital-E. They formulate, direct, and control the acts and practices of corporate respondent Vital-E. Respondents Milton Kalman, Sharon Kalman, and Normond Linder, individually and with each other, have also operated various other business entities under various fictitious trade names. Respondent Normond Linder is an officer of corporate respondent Advertising Unlimited of America, Inc. Respondent Normond Linder formulates, directs, and controls the acts and practices of corporate respondent Advertising Unlimited of America, Inc. The business address of respondents Milton Kalman and Sharon Kalman is 18588 Ventura Boulevard, Tarzana, California. The business address of respondent Normond Linder is 12400 Santa Monica Boulevard, Los Angeles, California.

Respondents cooperate and act together, and have cooperated and have acted together, to bring about the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of skin creams, oils and lotions, weight and body size reduction devices, physical appearance improvement devices, printed diet plans, dietary and vitamin supplements, art prints, entry blank forms for reserving the right to purchase lottery tickets or enter a lottery, and various other products, hereinafter sometimes referred to as respondents' products. Said skin creams, oils and lotions come within the classification of cosmetics as "cosmetic" is defined in the Federal Trade Commission Act. Said weight and body size reduction and physical appearance improvement devices come within the classification of devices as "device" is defined in the Federal Trade Commission Act. Said dietary and vitamin supplements come within the classification of foods or drugs as "food" and "drug" are defined in the Federal Trade Commission Act.

Respondent Advertising Unlimited of America, Inc., a corporation,

and its officer, respondent Normond Linder, are engaged in the preparation and publication of advertising material. They are now, and for some time last past have been, engaged in formulating, preparing, and placing for publication advertising copy in publications of general circulation and advertising copy for dissemination through the United States mail concerning respondents' products.

PAR. 3. In the course and conduct of their businesses as aforesaid, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from the State of California to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid businesses, respondents have disseminated and now disseminate, and have caused and now cause the dissemination of, certain advertisements concerning the said products through the United States mail and through various means in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers of general interstate circulation, and circulars and flyers disseminated through the United States mail, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of skin creams, oils and lotions, weight and body size reduction devices, physical appearance improvement devices, and dietary and vitamin supplements; and have disseminated and now disseminate, and have caused and now cause the dissemination of, certain advertisements concerning the said products by various means, including the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of the said products in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents have been, and are now, in substantial competition in or affecting commerce, with corporations, firms, and individuals, in the sale of products of the same general kind and nature as those sold by respondents.

COUNT I

Alleging violations of Sections 5 and 12 of the Federal Trade Commission Act, the allegations of Paragraphs One through Five

above are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 6. In the course of their aforesaid businesses, and for the purpose of inducing the purchase of creams, oils, lotions, and other cosmetics, respondents, individually and with each other, have made statements and representations for the promotion and sale, through the United States mail and other means, of said products with respect to the effectiveness or therapeutic value of said products in treating adverse skin conditions.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

Vitamin E Oil literally "feeds" oxygen to problem skin areas.

. . .Ginseng + E oil literally "feeds" oxygen to problem skin areas.

Here's why this natural Vitamin E suntan lotion works so well: Vitamin E: This on external application to the skin provides the benefit of having one of the essential vitamins soothe the epidermis and thereby makes tanning safe.

Natural Vitamin E Oil. It does wonders for: wrinkles, aging skin, rough skin, blemishes, facial lines, facial creases, surface scars, healing burns, healing wounds, stretch marks, under make-up.

[Ginseng + E oil]. . .transmits incredibly fast and beneficial effects to aging skin, wrinkles, stretch marks, blemishes, rough, dry, and other cosmetically related skin problems.

Private and medical literature also contain glowing reports as to its [Ginseng + E oil] effectiveness in the healing of burns, wounds, unsightly scars, and a host of skin problems.

. . .Vitamin E Oil rejuvenates skin and helps regain youthful, radiant looks without pills, drugs, diets, massaging, within minutes.

. . .Ginseng + E oil rejuvenates the skin and quickly helps regain a more youthful and radiant look within minutes.

Look years younger as wrinkles seem to vanish instantly. Natural Anti-Wrinkle Creme is a line smoothing natural high protein creme.

[Vitamin E Oil is] 100% safe.

Ginseng + E oil is 100% safe, non-allergenic and contains no hormones.

PAR. 7. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented and are now representing, directly or by implication, that:

1. The topical application of respondents' "Natural Vitamin E

Oil" and "Ginseng + E oil" will transmit oxygen to problem skin areas.

2. The transmission of oxygen to problem skin areas will alleviate the adverse conditions.

3. When topically applied, Vitamin E is of significant value in making suntanning safer and more effective.

4. The topical application of respondents' "Natural Vitamin E Oil" and "Ginseng + E oil" is highly effective in treating wrinkles, aging skin, rough skin, blemishes, facial lines, facial creases, surface scars, burns, wounds, stretch marks, and other adverse skin conditions.

5. The topical application of respondents' "Natural Vitamin E Oil," "Ginseng + E oil," and "Anti-Wrinkle Creme" will eliminate wrinkles or the appearance of wrinkles and will hinder, stop or reverse the aging process of the skin.

6. The topical application of respondents' "Natural Vitamin E Oils" and "Ginseng + E oil" poses no medical or health risk.

PAR. 8. In truth and in fact:

1. The topical application of respondents' "Natural Vitamin E Oil" and "Ginseng + E oil" will not transmit oxygen to problem skin areas.

2. The transmission of oxygen to problem skin areas will not alleviate the adverse conditions.

3. When topically applied, Vitamin E is not of significant value in making suntanning safer or more effective.

4. The topical application of respondents' "Natural Vitamin E Oil" and "Ginseng + E Oil" is ineffective in treating wrinkles, aging skin, rough skin, blemishes, facial lines, facial creases, surface scars, burns, wounds, stretch marks, and other adverse skin conditions.

5. The topical application of respondents' "Natural Vitamin E Oil," "Ginseng + E oil," and "Anti-Wrinkle Creme" will not eliminate wrinkles or significantly alleviate the appearance of wrinkles or hinder, stop or reverse the aging process of the human skin.

6. The topical application of respondents' "Natural Vitamin E Oil" and "Ginseng + E oil" poses a medical or health risk in that it will result in an irritating skin rash for many users.

Therefore, the advertisements referred to in Paragraphs Six and Seven in connection with inducing the purchase of cosmetics were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the acts and practices as set

forth in Paragraphs Six and Seven hereof were and are false, misleading, and deceptive.

PAR. 9. In the course of their aforesaid businesses, and for the purpose of inducing the purchase of weight and body size reducing and physical appearance improvement devices, respondents, individually and with each other, have made statements and representations for the promotion and sale, through the United States mail and other means, of said devices with respect to said devices' effectiveness or therapeutic value in weight or body size reducing or in contouring the chin and jowls.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

"Reducing belt!". . . Slip into belt and slimming action starts instantly. Wear one hour a day. Some have lost 4–6 inches. No weights, no exercise, no special diet, no trouble at all!

Lose pounds & inches easily. "Sauna Suit" melts away lbs. . . . Fat will melt away when you wear the marvelous new Sauna Suit. . . Effortless way to lose weight fast. Tighten sagging tissue on lower face. "Trim-A-Chin" with special facial lube cream. Doctor designed program will help tighten sagging tissues of lower face, help muscle tone, achieve smoother chin and jowl contours to give a more youthful appearance! Slip on soft comfortable latex belt. . . See big improvement in just 14 days.

PAR. 10. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented and are now representing, directly or by implication, that:

1. Wearing respondents' "Reducing Belt" will cause a reduction in size and weight for other than a temporary period of time.

2. Wearing respondents' "Sauna Suit" will cause a reduction in fat.

3. Wearing respondents' "Sauna Suit" will cause a reduction in size and weight without exercise or dieting which will be sustained for other than a temporary period of time.

4. Wearing respondents' "Trim-A-Chin" device will reduce the sagging of jowls associated with increasing age.

PAR. 11. In truth and in fact:

1. Wearing respondents' "Reducing Belt" will not cause a reduction in size or weight for other than a temporary period of time.

2. Wearing respondents' "Sauna Suit" will not cause a reduction in fat.

3. Wearing respondents' "Sauna Suit" will not cause a reduction in size and weight without exercising or dieting which will be sustained for other than a temporary period of time.

4. Wearing respondents' "Trim-A-Chin" device will not reduce

the sagging of jowls associated with increasing age except for the time that the device is worn.

Therefore, the advertisements referred to in Paragraphs Nine and Ten in connection with inducing the purchase of devices were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the acts and practices as set forth in Paragraphs Nine and Ten hereof were and are false, misleading, and deceptive.

PAR. 12. Since approximately 1971, in the course of their aforesaid businesses, and for the purpose of inducing the purchase of diet plans, respondents, individually and with each other, have made statements and representations for the promotion and sale of said products through the United States mail and other means. These diet plans have been disseminated as aforementioned under various names, including but not limited to, the "Grapefruit Diet," consisting of a printed diet plan, and the "Vitamin E Diet," the "All-Vitamin Diet," and the "New Grapefruit Pill Diet," all consisting of a printed diet plan and tablets. Thes tablets fall within the classification of foods or drugs as "food" and "drug" are defined in the Federal Trade Commission Act.

In promoting and disseminating these diet plans, respondents have used substantially similar advertising copy with the major change being in the name of the diet plan. In this advertising respondents have represented directly or by implication that these diets are based upon recent revolutionary scientific discoveries and techniques which allow the user rapidly to lose large amounts of weight with minimal or no effort, exercise, restriction in caloric intake, hunger, or medical risk. Contrary to these claims, adherence to these diets poses medical risks to certain individuals and is effective, if at all, only to the extent that these diets are based upon standard dieting techniques. Respondents have also misrepresented the amount of weight that may be lost and have represented directly or by implication that weight loss will be permanent when in some instances the weight loss involves merely a loss in fluid which may be rapidly regained.

In furtherance of these claims, respondents have represented in advertising that the consumption of certain foods or drugs recommended in these diet plans, including but not limited to, grapefruit, vitamin E, and numerous vitamins, minerals, and nutrients, can or will cause weight loss or significantly curb or eliminate hunger pangs and the desire to eat. In fact, to the extent that adherence to these diet plans results in weight loss, such weight loss is due to

restriction in caloric intake. The said foods or drugs do not have the claimed effects upon hunger pangs and the desire to eat.

Respondents have bolstered some of these claims by representing in advertising that a significant number of the United States population has used and proved the effectiveness of these diet plans when such is not the case. Respondents have also bolstered some of these claims by quoting in advertising an individual represented by respondents as being a nutritionist with a world-wide reputation when in fact this individual is not a nutritionist and is not widely known, if at all, in any scientific or medical field.

PAR. 13. Typical and illustrative of the statements and representations in those advertisements described in Paragraph Twelve, disseminated as aforesaid, but not all inclusive thereof, are the following:

Lose ten pounds with Grapefruit Diet in ten days. A new scientific grapefruit diet that "really works" is sweeping the country, enabling overweight people of all walks of life to easily and quickly become slim, trim and attractive, "while still eating all they want."

The use of Vital-E tablets and foods prescribed in the plan will, through natural action, help your body use up excess fat. Recent clinical tests indicate that Vitamin E added to a diet formerly deficient in it or in protein will "Double the speed of fat utilization."

. . .[T]heir use [Grapefruit Diet Pills] with the foods prescribed in the diet plan will, through nature, act to help your body use up and burn off excess fat and body fluids. . .

New scientific discoveries have produced an "all vitamin" diet tablet that eliminates hunger pangs and prevents overeating. . . . Those who use the new all-vitamin (plus E) diet tablet report that it is so effective you will lose weight the very first day and keep on losing day after day until you reach your most attractive size—without exercise and starvation.

PAR. 14. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented, and are now representing, directly or by implication, that:

1. Most individuals adhering to the "Grapefruit Diet" will lose ten pounds within ten days and such weight loss will be sustained for other than a temporary period of time.

2. Individuals adhering to the "Grapefruit Diet" can consume food without regard to caloric intake and still lose weight.

3. The consumption of grapefruit, its constituents or extracts, or vitamin E will cause weight loss in whole or in part.

4. The tablets taken in accordance with the "All-Vitamin Diet"

will have a physiological effect which will significantly eliminate or reduce hunger pangs and thereby prevent overeating.

PAR. 15. In truth and in fact:

1. Most individuals adhering to the "Grapefruit Diet" will not lose ten pounds within ten days. In those instances in which an individual does lose ten pounds within ten days the weight loss will be mostly loss of fluid which will be rapidly regained if the user does not continue to restrict his caloric intake.

2. Individuals adhering to the "Grapefruit Diet" cannot consume food without regard for caloric intake in that said plan requires the user to reduce his caloric intake in order to lose weight.

3. The consumption of grapefruit, its constituents or extracts, or vitamin E will not cause weight loss in whole or in part.

4. The tablets taken in accordance with the "All-Vitamin Diet" will not have a physiological effect which will significantly eliminate or reduce hunger pangs and thereby prevent overeating.

Therefore, the statements as set forth in Paragraphs Twelve, Thirteen, and Fourteen in connection with inducing the purchase of foods and drugs were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the acts and practices set forth in Paragraphs Twelve, Thirteen, and Fourteen hereof were and are false, misleading, and deceptive.

PAR. 16. At the time the scientific, medical, or therapeutic representations and statements referred to and described in Paragraphs Six, Seven, Nine, Ten, Twelve, Thirteen, and Fourteen were made respondents directly or by implication represented that they had a reasonable basis for said representations and statements when in truth and in fact respondents had no competent and reliable scientific or medical evidence to support such representations and statements.

Therefore, the statements as set forth in Paragraphs Six, Seven, Nine, Ten, Twelve, Thirteen, and Fourteen in connection with inducing the purchase of foods, drugs, cosmetics, and devices were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the acts and practices set forth in Paragraphs Six, Seven, Nine, Ten, Twelve, Thirteen and Fourteen hereof were and are false, misleading, unfair, and deceptive.

PAR. 17. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents have been, and are now, in substantial competition in, affecting, or having an effect upon commerce, with corporations, firms, and individuals in the sale

of products of the same general kind and nature as those sold by respondents.

PAR. 18. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 19. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in, affecting, or having an effect upon commerce and unfair or deceptive acts and practices in, affecting, or having an effect upon commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Nineteen above are incorporated in Count II as if fully set forth verbatim.

PAR. 20. In the course and conduct of their aforesaid businesses, and for the purpose of inducing the purchase of art prints, respondents, individually and with each other, have made numerous statements and representations in circulars, periodicals, and other materials with respect to the nature of their business and products.

Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following:

PUBLIC OFFERED 1937 U.S. GOV'T ART PRINTS.

Send cash, check or money order to: U.S. Surplus, Department C, P.O. Box 605, Tarzana, Calif. 91356.

PAR. 21. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented and are now representing, directly or by implication, that:

1. The United States government or any of its agencies, subdivisions, instrumentalities, or representatives or agents in their official capacities printed or caused to be printed in 1937 certain art prints sold by respondents.

2. Respondents' business engaged in the sale of art prints is a United States government agency, enterprise or entity and that

respondents' sale of said art prints is sponsored by or supported under the auspices of the United States government or any of its agencies, subdivisions, instrumentalities, or representatives or agents in their official capacities.

PAR. 22. In truth and in fact:

1. The United States government or any of its agencies, subdivisions, instrumentalities, or representatives or agents in their official capacities did not print or cause to be printed the said 1937 art prints.

2. Respondents' business engaged in the sale of art prints is not a United States government agency, enterprise or entity and respondents' sale of said art prints is not sponsored by or supported under the auspices of the United States government, or any of its agencies, subdivisions, instrumentalities, or representatives or agents in their official capacities.

Therefore, respondents' statements or representations as set forth in Paragraphs Twenty and Twenty-One hereof, were and are false, misleading, and deceptive.

PAR. 23. In the course and conduct of their aforesaid businesses, and for the purpose of inducing the purchase of entry blank forms for reserving the right to purchase lottery tickets or to enter a lottery or lotteries, respondents, individually and with each other, have made numerous statements and representations in circulars, periodicals and other materials with respect to the nature of said entry blank forms.

Typical and illustrative of these statements and representations, but not all inclusive thereof, are the following:

You can become a "millionaire over night" with a 50¢ per week gamble in a legalized eastern state sponsored lottery no matter where you now live.

Your chances are great! There are on an average of 20,000 WINNERS EACH WEEK ranging from $40, $400, $4,000 to $50,000. You also have a chance to win the "Millionaire" Grand Prize which is drawn once every six weeks.

Winners, who now come from all over the country, are promptly notified and automatically paid by the State Treasury through a computerized system. It's absolutely legal, State Government sponsored, certified and honest. Take a chance! You may win a fortune!

Everybody can participate no matter where you live. To get your simple entry blank and full details send $3. . .

PAR. 24. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented, directly or by implication, that:

1. Those who purchase said entry blank forms from respondents are purchasing lottery tickets or are entering a lottery or lotteries sponsored by a state government.

PAR. 25. In truth and in fact:

1. A purchaser does not purchase a lottery ticket and does not enter a lottery or lotteries. Instead, a buyer receives an application form for a lottery ticket reservation plan which requires additional payment to the State of New Jersey before the buyer may enter a lottery.

Therefore respondents' statements and representations as set forth in Paragraphs Twenty-Three and Twenty-Four hereof, were and are false, misleading, and deceptive.

PAR. 26. The use by respondents of aforesaid false, misleading, and deceptive statements, representations, acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 27. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on May 11, 1976, charging respondents with violation of Sections 5 and 12 of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint and the administrative law judge having issued his order on October 18, 1976, amending the said complaint in accordance with Sections 3.15(a)(1) and 3.22 of the Commission's Rules, and the respondents having been served with a copy of that order; and

The Commission having duly determined upon a joint motion of complaint counsel and respondents' counsel that in the circumstances presented, the public interest would be served by withdrawal of the matter from adjudication pursuant to Section 3.25 of the Commission's Rules; and

The respondents and complaint counsel having executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint,

a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, as amended, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Vital-E is or was a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, trading and doing business under its own name and as Mail Order Services, with its principal office and place of business located at 18588 Ventura Boulevard, Tarzana, California.

Respondent Advertising Unlimited of America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, trading and doing business as Normond Linder & Associates, with its principal office and place of business located at 12400 Santa Monica Boulevard, Los Angeles, California.

Respondents Milton Kalman, Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, and Normond Linder are individuals and are or were officers of corporate respondent Vital-E. They formulate(d), direct(ed) and control(led) the acts and practices of corporate respondent Vital-E. Respondents Milton Kalman and Sharon Kalman, individually and with each other, have also operated various other business entities under various fictitious trade names. Respondent Normond Linder is an officer of corporate respondent Advertising Unlimited of America, Inc. Respondent Normond Linder formulates, directs, and controls the acts and practices of respondent Advertising Unlimited of America, Inc. The business address of respondent Milton Kalman is 18588 Ventura Boulevard, Tarzana, California. The business address of Sharon Kalman is 18584 Ventura Boulevard, Tarzana, California. The business address of respondent Normond Linder is 12400 Santa Monica Boulevard, Los Angeles, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

Definitions

"Capacity of an advertising agent" refers to the creation, preparation or placement of advertising by a designated respondent (or the respondent's officers, agents, representatives, and employees) on the behalf of others for the receipt of compensation which is reasonable and customary in the advertising industry.

"Food," "drug," "cosmetic," and "device," when explicitly or implicitly referring to products, shall be defined as these terms are defined in the Federal Trade Commission Act, as amended.

I.

It is ordered, That respondents Vital-E, a corporation trading and doing business under its own name and as Mail Order Services; and Advertising Unlimited of America, Inc., a corporation trading and doing business as Normond Linder & Associates; and Milton Kalman, individually and as an officer of corporate respondent Vital-E; and Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, individually and as an officer of corporate respondent Vital-E; and Normond Linder, individually and as an officer or former officer of corporate respondent Vital-E and as an officer of corporate respondent Advertising Unlimited of America, Inc.; and each of the respondents, their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of skin creams, oils and lotions; weight-reduction and body-size-reduction devices; physical-appearance-improvement devices; diet plans; dietary and vitamin supplements; any food, drug, cosmetic, or device; or any other products; do forthwith cease and desist from:

1. Disseminating, or causing to be disseminated, by means of the United States mail or by any means in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement which represents, directly or by implication, that:

A. Vitamin E, vitamin E oil, or ginseng oil is effective or has value in transmitting oxygen to skin areas.

B. The transmission of oxygen to adversely affected skin areas is of therapeutic or cosmetic value.

C. Vitamin E is effective or of value in making suntanning safer or more effective.

D. Vitamin E, vitamin E oil, or ginseng oil is effective or of value in treating rough skin, blemishes, scars, stretch marks or any other adverse skin condition.

E. Any cream, oil, lotion, drug, cosmetic or any other product is effective or of value in treating or eliminating blemishes, scars, burns, wounds, stretch marks, or any other adverse skin condition, unless respondents can establish such is the fact.

F. Vitamin E, vitamin E oil, ginseng oil, or any cream, oil, lotion, cosmetic, drug or other product is effective or of value in treating or eliminating wrinkles, creases, aging skin or is effective or of value in hindering, stopping, or reversing the aging process.

G. The "Reducing Belt," "Sauna Suit," or any other device purported to be effective or of value for the purpose of weight control, weight reduction, or reduction in body size, without dieting or exercise, is effective or of value for that said purpose.

H. The "Trim-A-Chin" or any other device purported to firm, contour, or eliminate sagging jowls is effective or of value in firming, contouring, or eliminating sagging jowls.

I. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing, or body-size-reducing product or any other product is based upon recent significant or revolutionary scientific or medical discoveries or techniques, unless respondents can establish such is the fact.

J. Vitamin E, vitamin E oil, ginseng oil, any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing device, or any food, drug, cosmetic or device, or other product has any health, nutritional, cosmetic or other use, when such use poses any health or cosmetic risk known to respondents or established by competent and reliable medical or scientific evidence, without

(i) clearly and conspicuously stating in any advertisement for said product that the product may pose health or cosmetic risks to some users;

(ii) clearly and conspicuously stating on the product or its container, or in instructions accompanying the product, the extent and nature of such risks;

(iii) making to the purchaser a bona fide offer of a full refund of the price paid by the purchaser, with this refund to be paid within a reasonable period of time; and

(iv) clearly and conspicuously stating in immediate conjunction with the statement required by provision I.1.J. (ii) that the purchaser may receive a refund as described in provision I.1.J.(iii).

K. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing product will cause any amount of weight reduction or reduction in body size, or any amount of weight reduction or reduction in body size within any particular period of time, unless respondents can establish such is the fact.

L. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing product will cause any amount of weight reduction or reduction in body size, or any amount of weight reduction or reduction in body size within any particular period of time, when most of such reduction in weight or body size will be due to fluid loss.

M. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing product is effective or of value for the purpose of weight control or reducing weight or body size, unless in immediate conjunction therewith it is disclosed clearly and conspicuously that any weight control or reduction in weight or body size which might result after use of said product would be by reason of exercise or restriction in caloric intake or a combination of the two.

N. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing product will allow the user to lose weight without exercise or restriction in caloric intake.

O. The consumption of grapefruit, its constituents or extracts, vitamin E, or any other food or drug may or will cause weight loss in whole or in part.

P. The consumption of grapefruit, its constituents or extracts, vitamin E, or any other vitamins, or minerals will have a physiological effect which may or will significantly reduce or eliminate hunger or the desire to eat.

Q. The consumption of any food or drug or the use of any other product will significantly reduce or eliminate hunger or the desire to eat, unless respondents can establish such is the fact.

R. Any diet plan, food, drug, cosmetic, device or other product has been used, tested or proved effective by a significant number of individuals, unless respondents can establish such is the fact.

S. Any individual is a nutritionist or has any formal qualifications, training, credentials, scientific, medical or other kind of expert reputation, unless respondents can establish such is the fact.

T. "E-Pill" or vitamin E will restore, maintain, enhance or rejuvenate sexual potency or sexual drives.

U. Any food, drug or device, other than "E-Pill" or vitamin E,

will restore, enhance or rejuvenate sexual potency or sexual drives, unless respondents can establish such is the fact.

2. With the exception of respondents Advertising Unlimited of America, Inc. (a corporation trading and doing business as Normond Linder & Associates) and Normond Linder (individually and as an officer of corporate respondent Advertising Unlimited of America, Inc.), but only to the extent that they act in the capacity of an advertising agent—making any statement or representation, directly or by implication, in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, concerning the safety, performance or effectiveness of any skin cream, oil, or lotion; any physical-appearance-improvement device; any diet plan, dietary or vitamin supplement or other purported weight-control, weight-reducing, or body-size-reducing product; or any food, drug, cosmetic or device; unless

A. The statement or representation is substantiated by controlled scientific tests, conducted by recognized experts on behalf of respondents or others, with these tests relied upon by respondents at the time said statement or representation is made; and

B. The results and methodology of the tests required by provision I.2.A., together with the original data collected, are maintained by respondents for so long as material containing said statement or representation is disseminated or approved for dissemination, or said statement or representation is made by respondents, and for a further period of three (3) years after respondents' last dissemination of such material, termination of approval of dissemination of such material, or last such statement, whichever period is longest; and

C. The records described in provision I.2.B. are so organized as to refer to the said statement or representation and may be inspected by Commission staff members upon reasonable notice.

3. Excluding respondents Vital-E, Milton Kalman and Sharon Kalman, as these respondents are described in the main preamble, but including, to the extent that they act in the capacity of an advertising agent, respondents Advertising Unlimited of America, Inc. (a corporation trading and doing business as Normond Linder & Associates) and Normond Linder (individually and as an officer of corporate respondent Advertising Unlimited of America, Inc.)

A. Making any statement or representation, directly or by implication, in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, concerning the safety, performance or effectiveness of any skin cream, oil or lotion; any physical-appearance-improvement

device; any diet plan, dietary or vitamin supplement, or other purported weight-control, weight-reducing, or body-size-reducing product; or any food, drug, cosmetic or device; unless there exists competent and reliable scientific or medical evidence to provide a reasonable basis for such statement or representation upon which respondents relied at the time such statement or representation was made.

B. Failing to keep adequate records which may be inspected by Commission staff members upon reasonable notice:

(i) which provided the basis upon which respondents relied at the time the statement or representation as described in provision I.3.A. was made; and

(ii) which shall be maintained by respondents for so long as material containing said statement or representation is disseminated or approved for dissemination, or said statement or representation is made by respondents, and for a further period of three (3) years after respondents' last dissemination of such material, termination of approval of dissemination of such material, or last such statement, whichever period is longest.

4. With the exception of respondents Advertising Unlimited of America, Inc. (a corporation trading and doing business as Normond Linder & Associates) and Normond Linder (individually and as an officer of corporate respondent Advertising Unlimited of America, Inc.), but only to the extent that they act in the capacity of an advertising agent—misrepresenting by any means or in any manner in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, the quality, merits, or result of use of any food, drug, cosmetic or device, or advertising, offering for sale, selling or distributing the said product or products with the effect, purpose or intent to deceive, to mislead, or to make any false or unsubstantiated claim concerning the quality, the merits, or the result of the use of the said product or products.

5. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any skin cream, oil or lotion, weight-reduction or body-size-reduction device, physical-appearance-improvement device, diet plan, dietary or vitamin supplement, or any food, drug, cosmetic, or device, in, affecting, or having an effect upon commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement which contains any representations prohibited in provisions I.1., 2., 3., and 4. hereto.

II.

It is further ordered, That respondents Vital-E, a corporation trading and doing business under its own name and as Mail Order Services; and Advertising Unlimited of America, Inc., a corporation trading and doing business as Normond Linder & Associates; and Milton Kalman, individually and as an officer of corporate respondent Vital-E; and Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, individually and as an officer of corporate respondent Vital-E; and Normond Linder, individually and as an officer or former officer of corporate respondent Vital-E and as an officer of corporate respondent Advertising Unlimited of America, Inc.; and each of the respondents, their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of art prints, order blank forms for reserving the right to purchase lottery tickets or to enter a lottery or lotteries, or any other product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, directly or by implication, that any businesses or enterprises are government agencies or entities, or that any businesses, enterprises, or products are supported, sponsored, endorsed by or affiliated with any government agency or entity, or are supported, sponsored, endorsed by or affiliated with any government officers, agents, representatives or employees in their official capacities, unless respondents can establish such is the fact.

2. With the exception of respondent Advertising Unlimited of America, Inc., a corporation trading and doing business as Normond Linder & Associates, misrepresenting in any manner the nature or scope of respondents' business operations or the source of any product.

3. Advertising for the sale of order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries without clearly and conspicuously stating therewith that the purchaser is not entering a lottery or lotteries.

III.

It is further ordered, That for a period of ten (10) years from the effective date of this order the individual respondents named herein shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new

business or employment engaged, during the time of such employment or affiliation, in the advertising, offering for sale, sale, or distribution of diet plans; dietary and vitamin tablets; products to be applied to skin; physical-appearance-improvement devices; weight-reducing or body-size-reducing devices; foods; drugs; cosmetics; devices; art prints; or order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries.

It is further ordered, That for a period of ten (10) years from the effective date of this order the individual respondents named herein shall promptly notify the Commission of their acquisition, directly or indirectly, of 10% or more of the beneficial ownership of voting stock in any corporation, or of their disposition of such stock, whenever such disposition results in their beneficial ownership decreasing below 10%; *provided, however,* this provision shall be limited to corporations engaging or which have been engaged in the advertising, offering for sale, sale, or distribution of diet plans; dietary and vitamin tablets; products to be applied to skin; physical-appearance-improvement devices; weight-reducing or body-size-reducing devices; foods; drugs; cosmetics; devices; art prints; or order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries.

It is further ordered, That respondents, including respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, for a period of three (3) years from the effective date of this order, upon the submission of an advertisement for publication or broadcasting, shall furnish each newspaper, periodical, or other advertising medium with a written statement indicating for which respondents, as respondents are named in this order, the advertisement was created, prepared, disseminated or caused to be disseminated; *provided, however,* this provision shall be limited to the submission of advertisements pertaining to the advertising, offering for sale, sale, or distribution of diet plans; dietary and vitamin tablets; products to be applied to skin; physical-appearance-improvement devices; weight-reducing or body-size-reducing devices; foods; drugs; cosmetics; devices; art prints; or order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries.

It is further ordered, That respondents, including respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, for a period of three (3) years following an advertisement's last dissemination, shall retain and make available for inspection by Commission staff members upon reasonable notice any advertisement which respon-

dents created, prepared, disseminated or caused to be disseminated, as well as those records indicating the media, by name and address, and date of each dissemination of said advertisement; *provided, however,* this provision shall be limited to advertisements pertaining to the advertising, offering for sale, sale or distribution of diet plans; dietary and vitamin tablets; products to be applied to skin; physical-appearance-improvement devices; weight-reducing or body-size-reducing devices; foods; drugs; cosmetics; devices; art prints; or order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries.

It is further ordered, That respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions engaged in advertising or in mail order sales.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

IN THE MATTER OF

ALDENS, INC.

CONSENT ORDER, ECT., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, EQUAL CREDIT OPPORTUNITY AND FAIR CREDIT REPORTING ACTS

Docket C-2940. Complaint, Nov. 30, 1978 — Decision, Nov. 30, 1978

This consent order requires a Chicago, Ill. mail order house to cease discriminating against credit applicants on basis of sex or marital status, and to cease failing to timely provide rejected applicants with the reasons for such adverse action. Further, when denial of credit is based on consumer credit reports, the firm is required to furnish affected parties with the names and addresses of reporting companies.

Appearances

For the Commission: *C. Lee Peeler* and *Sally Gold.*

For the respondent: *Lawrence F. Henneberger* and *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Equal Credit Opportunity Act, as amended, its implementing regulation, Regulation B, the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by such Acts, the Federal Trade Commission, having reason to believe that Aldens, Inc., a corporation, has violated the provisions of said Acts and regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. For the purposes of this complaint the following definitions are applicable:

1. The terms "account," "applicant," "application," "contractually liable," "credit," "creditor," "credit transaction," "discriminate against an applicant because of sex or marital status," "marital status" and "open-end credit" shall be defined as provided in Section 202.3 of Regulation B (12 C.F.R. 202.3 (1976)).

2. The terms "consumer report" and "consumer reporting agency" shall have the same meaning as provided in Sections 603(d) and 603(f), respectively, of the Fair Credit Reporting Act (15 U.S.C. 1681, 168la(d) and (f)(1970)).

3. "Joint account" shall mean an account where the nonapplicant spouse will be contractually liable or will be an authorized user

on the account or where the applicant has relied on the spouse's income or on community property to support the extension of credit. "Separate account" shall mean an account where the nonapplicant spouse will neither be contractually liable nor an authorized user on the account and where the applicant does not rely on the spouse's income or on community property to support the extension of credit.

4. "Regulation B" shall refer to that version of Regulation B (12 C.F.R. 202) in effect from October 28, 1975 through March 22, 1977. "Amended Regulation B" shall refer to that version of Regulation B in effect on or after March 23, 1977.

PAR. 2. Respondent Aldens, Inc. (hereinafter referred to as "Aldens" or "respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal office and place of business located at 5000 West Roosevelt Road, Chicago, Illinois.

PAR. 3. Respondent is engaged in the direct mail sale of consumer products in interstate commerce. In the regular course of its business, respondent finances the sale of its products by extending credit to its customers through the use of its open end credit plan (Aldens Charge Account).

COUNT I

Alleging violations of the Equal Credit Opportunity Act, the allegations of Paragraphs One, Two and Three heretofore are incorporated by reference into Count I as if fully set forth verbatim.

PAR. 4. As part of its procedures for evaluating applicants for Aldens Charge Accounts, respondent has formulated written instructions to its employees which set forth the criteria to be applied in selecting applicants to be granted credit. Subsequent to October 28, 1975 and pursuant to respondent's written instructions concerning the evaluation of occupational categories, respondent has automatically rejected applications from "waitresses" without any further evaluation of the applicants' qualifications. During the same period, respondent has not automatically rejected applications from "waiters" but has proceeded to evaluate such applications on the basis of the applicants' qualification.

PAR. 5. By and through use of the practices described in Paragraph Four, above, respondent has discriminated against female applicants for credit on the basis of sex. Therefore, respondent has violated Sections 205.5(f) and 202.2 of Regulation B.

PAR. 6. In a substantial number of instances subsequent to November 20, 1975 pursuant to respondent's initial screening process, respondent has automatically rejected applicants for credit

whose source of income is child support without evaluating the applicants' other qualifications.

PAR. 7. By and through the practice described in Paragraph Six, above, respondent has failed to consider child support payments as income to the extent that such payments are likely to be consistently made. Therefore, respondent has violated Sections 202.5(d)(2) and 202.2 of Regulation B.

PAR. 8. Subsequent to June 30, 1976, in the ordinary course of business, respondent has required persons who wish to obtain an Aldens Charge Account to fill out an Aldens Charge Application form. (A typical example of respondent's "Aldens Charge Application" is attached hereto as Exhibit A.) The Aldens Charge Application may be used, inter alia, by a married person to apply for a separate account or to apply for a joint account.

With respect to applications for both separate and joint accounts, the Aldens Charge Application instructs the applicant to disclose the "spouse's first name." In a substantial number of instances subsequent to June 30, 1976, married applicants who applied for separate accounts have disclosed the first name of their spouse pursuant to respondent's instructions.

PAR. 9. In a substantial number of instances subsequent to October 28, 1975, respondent has ordered and evaluated consumer reports on the spouses of married female applicants for separate accounts but has not ordered and evaluated consumer reports on the applicants. In a substantial number of these instances, respondent has denied the applications on the basis of information from a consumer report on the applicant spouse. Respondent does not, in the normal course of business, order consumer reports on the spouses of married male applicants for separate accounts.

PAR. 10. By and through the practices described in Paragraphs Eight and Nine, above, respondent has requested subsequent to June 30, 1976, information about the spouse of an applicant where the applicant was not relying on income, alimony, child support or separate maintenance payments from a spouse or former spouse or on community property to support the extension of credit and where the spouse would neither be contractually liable on the account nor an authorized user on the account. Therefore, respondent has violated Section 202.5(b)(3) of Regulation B.

PAR. 11. By and through the practices described in Paragraph Eight, above, respondent has asked the applicant's marital status where the applicant has applied for an unsecured separate account in a non-community property state except as required to comply with state law governing permissible finance charges or loan

ceilings. Therefore, respondent has violated Section 202.4(c)(1) of Regulation B.

PAR. 12. By and through the practices described in Paragraph Nine, above, respondent has used information requirements and investigatory procedures which have the effect of discriminating against married females who apply for separate accounts. Therefore, respondent has violated Section 202.2 of Regulation B.

PAR. 13. In the ordinary course of its business subsequent to October 28, 1975, respondent has ordered and considered in connection with the evaluation of Aldens Charge Applications consumer reports from "Credit Index," a subsidiary of Hooper-Homes Bureau, Inc., which consist of adverse credit information concerning persons residing at the applicant's address who have the same last name as the applicant. Pursuant to respondent's written instructions, respondent has rejected applications for separate credit where a Credit Index report contains adverse information on any person who has the same last name as the applicant at the applicant's address.

PAR. 14. By and through the practices described in Paragraph Thirteen, above, respondent has imposed information requirements and investigatory procedures which have the effect of discriminating against married applicants. Therefore, respondent has discriminated against married applicants in violation of Section 202.2 of Regulation B.

PAR. 15. Subsequent to November 30, 1975, in the ordinary course of business respondent has refused to extend joint accounts to married couples where the wife uses her birth given surname or a combined surname rather than her husband's surname.

PAR. 16. By and through the practices described in Paragraph Fifteen, above, respondent has prohibited female applicants from opening or maintaining an account in a birth given first name and surname or a birth given first name and a combined surname. Therefore, respondent has violated Section 202.4(e) of Regulation B.

PAR. 17. Subsequent to November 30, 1975, in the ordinary course of business respondent has refused to extend joint accounts to creditworthy unmarried persons on the basis of marital status.

PAR. 18. By and through the practices described in Paragraph Seventeen, above, respondent has discriminated against applicants on the basis of marital status. Therefore, respondent has violated Section 202.2 of Regulation B.

PAR. 19. In the ordinary course of its business, subsequent to November 20, 1976, respondent has failed to retain for fifteen months after the date respondent notified the applicant of action

taken on an application, the following written or recorded information used by respondent in evaluating applications for credit: (1) written consumer reports received from consumer reporting agencies, (2) worksheets on which information given orally by a consumer reporting agency concerning an applicant's credit history was recorded by respondent's employees, (3) worksheets on which information concerning the applicant derived from telephone calls to various natural persons, corporations and partnerships was recorded by respondent's employees and (4) written documents on which the points assigned to applicants' answers to various items on the Aldens Charge Application by respondent's point scoring system were recorded by respondent's employees.

PAR. 20. By and through the practices described in Paragraph Nineteen above, respondent has failed to retain as to each applicant all written and recorded information used in evaluating the applicant for the period ending fifteen months after the date respondent gave the applicant notice of action on the application. Therefore, respondent has violated Section 202.9 of Regulation B.

PAR. 21. Subsequent to January 31, 1976, a substantial number of applicants for Aldens Charge Accounts failed to satisfy respondent's standards of creditworthiness and were informed that credit was denied by means of one of respondent's form rejection letters "2102", "2103" or "2104" (see Exhibits B, C and D) stamped with the following statement:

YOUR FILE NO. _____

IF YOU HAVE ANY QUESTIONS CONCERNING OUR DECISION PLEASE RETURN THIS LETTER AND YOUR ORDER, OR REFER TO YOUR FILE NUMBER.

PAR. 22. In a substantial number of instances subsequent to January 30, 1976 Aldens responded to applicants' requests for the reasons for denial which were accompanied by the reference number, by advising such applicants that it could not provide the reason for the denial by means of the "CLTD" letter (see Exhibit E), set forth in relevant part below:

Your letter was referred to me for personal attention. We are unable to determine the exact reason your application was not approved. Records are kept by us to facilitate answering letters by our customers, but unfortunately we cannot locate any information regarding your recent application.

In fact, respondent was capable of locating the application and furnishing the reason for denial.

PAR. 23. In a substantial number of instances subsequent to January 30, 1976, when an applicant asked respondent for the

reasons for denial, respondent obtained a consumer report on the applicant.

In some instances respondent approved the application after evaluating the consumer report. In such cases, respondent did not provide the applicant with the reasons for the initial denial.

In other instances, where positive information in the consumer report did not justify reevaluation of the decision to deny the application, respondent advised the applicant by means of a "CBY", "CBX" or "CBRM" letter (see Exhibits F, G and H), set forth in relevant part below, that:

> We regret very much we were unable to open a credit account for you . . . . This decision was based upon information contained in a Consumer Credit Report we requested from . . . .

In fact, respondent's initial decision to deny such applications was not based upon information derived from a consumer credit report from the consumer reporting agency named by respondent, but was based on the applicant's failure to meet respondent's initial screening requirements or on the applicant's failure to achieve a minimum qualifying score under respondent's point scoring system.

PAR. 24. On and after January 31, 1976 respondent refused to provide the reasons for a denial of an application upon the oral request of its applicants.

PAR. 25 By and through the practices described in Paragraphs Twenty-Two, Twenty-Three and Twenty-Four respondent has failed to establish and maintain suitable procedures to provide each applicant who is denied credit or whose account is terminated the reasons for denial, upon the request of the applicant. Therefore, respondent has violated Section 202.5(m)(2) of Regulation B.

PAR. 26. Pursuant to Section 702(g) of the Equal Credit Opportunity Act, respondent's aforesaid failures to comply with Regulation B as alleged in Paragraphs Five, Seven, Ten, Eleven, Twelve, Fourteen, Sixteen, Eighteen, Twenty and Twenty-Five above, constitute violations of that Act and pursuant to Section 704(c) thereof, respondent has violated Section 5(a)(1) of the Federal Trade Commission Act.

COUNT II

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One, Two and Three heretofore are incorporated by reference into Count II as if fully set forth verbatim.

PAR. 27. Respondent in the ordinary course and conduct of its business, obtains consumer reports from consumer reporting agen-

cies. Respondent uses in whole or in part information contained in these consumer reports to deny applications for Aldens Charge Accounts.

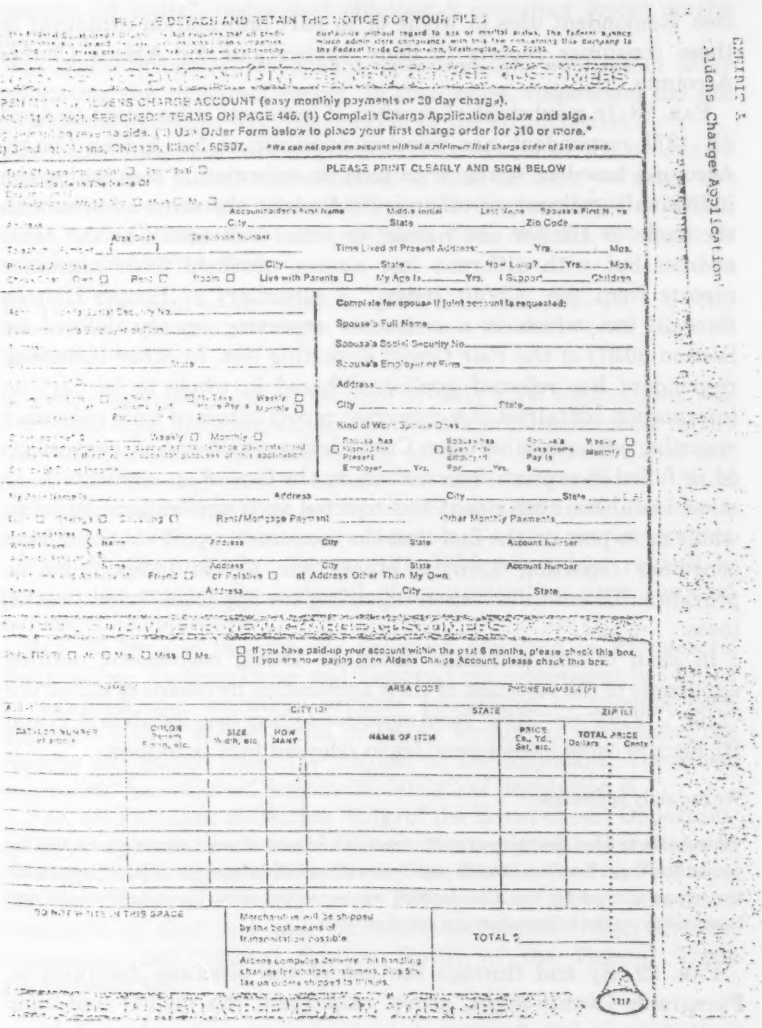
PAR. 28. In a substantial number of instances subsequent to April 25, 1971 respondent has rejected applications for Aldens Charge Accounts based in whole or in part on information concerning the individual applicant, or other individuals at the same address with the same or similar last names, or other individuals at the same address but with different last names, obtained from consumer reports from the "Credit Index," a subsidiary of Hooper-Holmes Bureau, Inc. which is a consumer reporting agency defined by Section 603(f) of the Fair Credit Reporting Act. In other instances, respondent has rejected applicants based in whole or in part on information contained in a consumer report obtained from consumer reporting agencies other than Credit Index which varied, contradicted or failed to confirm information on the face of an application. In other instances, respondent has rejected such applications based in whole or in part on the fact that the consumer report obtained from consumer reporting agencies other than Credit Index failed to provide sufficient information regarding the applicant's creditworthiness.

In each of the instances described above, respondent notified applicants of the rejection of their application by means of either the "2102", "2103" or "2104" form rejection letters (see Exhibits B, C and D). Each of these letters provides in relevant part as follows:

We certainly appreciate . . .

Your desire to open an Aldens Credit Account and wish it were possible to do this for you at this time. Your application was reviewed and at the present time we are unable to open an account for you. Our decision was according to our usual policies and was based solely on the information you supplied to us.

PAR. 29. By and through the use of the practices described in Paragraph Twenty-Eight, above, respondent has denied consumer credit for personal, family or household purposes based in whole or in part on information contained in a consumer report without so advising the consumer and without supplying the name and address of the consumer reporting agency making the report. Therefore, respondent has violated the provisions of Section 615(a) of the Fair Credit Reporting Act.



PLEASE DETACH AND RETAIN THIS NOTICE FOR YOUR FILE

customer without regard to sex or marital status. The Federal Agency which administers compliance with this law concerning this company is the Federal Trade Commission, Washington, D.C. 20580.

OPEN AN ALDENS CHARGE ACCOUNT (easy monthly payments or 30 day charge).

ONLY IF YOU ARE NOT SEE CREDIT TERMS ON PAGE 446. (1) Complete Charge Application below and also

(2) Send for Aldens, Chicago, Illinois 60607. *We can not open an account without a minimum first charge order of $10 or more.

PLEASE PRINT CLEARLY AND SIGN BELOW

Accountholder's First Name Middle Initial Last Name Spouse's First Name

City State Zip Code

Area Code Telephone Number

Time Lived at Present Address: Yrs. Mos.

City State How Long? Yrs. Mos.

Own Rent Room Live with Parents My Age Is Yrs. I Support Children

Complete for spouse if joint account is requested:

Spouse's Full Name

Spouse's Social Security No.

Spouse's Employer or Firm

Address

City State

Kind of Work Spouse Does

Spouse has Worked Here Present Employer Yrs.

Spouse has Been With Company Yrs.

Spouse's Take-home Pay Is Weekly Monthly

Address City State

Rent/Mortgage Payment Other Monthly Payments

Name Address City State Account Number

Name Address City State Account Number

Friend or Relative at Address Other Than My Own.

Address City State

If you have paid-up your account within the past 6 months, please check this box.

If you are now paying on an Aldens Charge Account, please check this box.

NAME AREA CODE PHONE NUMBER (IF)

ADDRESS CITY (S) STATE ZIP (S)

CATALOG NUMBER or page no.	COLOR (Green, Khaki, etc.)	SIZE (Width, etc.)	HOW MANY	NAME OF ITEM	PRICE (Ea., Yd., Set, etc.)	TOTAL PRICE Dollars . Cents

DO NOT WRITE IN THIS SPACE

Merchandise will be shipped by the best means of transportation possible.

TOTAL $

Aldens computes delivery and handling charges for charge customers, plus 5% tax on orders shipped to Illinois.

1217

Aldens Charge Application

EXHIBIT 2
"2102 Letter"

ALDENS

5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60607

We certainly appreciate . .

your desire to open an Aldens Credit Account and wish it were possible to do this for you at this time.

Your application for credit was reviewed and at the present time we are unable to open an account for you. Our decision was according to our usual policies, and was based solely on information you supplied to us.

Since you undoubtedly want some or all of the merchandise you selected, why not send us a cash order . . . as many of our customers do . . . for everything you need now. This will enable you to take advantage of the excellent values you selected.

Thanks again for thinking of Aldens.

ALDENS, INC.

Charles Arthur

CHARLES ARTHUR
New Account Manager

2102 ADP
CA:TDA
enc: c.o.

YOUR FILE NO. _____

If you have any questions concerning our decision, please return this letter and your order, or refer to your file number.

EXHIBIT C

"2103 Letter"

We certainly appreciate . . .

your desire to open an Aldens credit account and wish it were possible to do this for you at this time.

Your application for credit has been reviewed and at the present time we may not open an account for you. Our decision was according to our usual policies, and was based solely on information you supplied to us.

Meanwhile, you undoubtedly want some or all of the merchandise you selected. Why not send us a cash or C.O.D. order (25% down payment required on C.O.D. orders). . . as so many of our customers do . . . for everything you need now. This will enable you to take advantage of the excellent values you selected.

Thanks again for thinking of Aldens.

ALDENS, INC.

Charles Arthur

CHARLES ARTHUR
New Account Manager

2103
CA:TDA
Enc: C.O.

YOUR FILE NO. _____

If you have any questions concerning our decision, please return this letter and your order, or refer to your file number.

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

[redacted] 5699 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60650

EXHIBIT D
"2104 Letter"

We certainly appreciate . .

your desire to open an Aldens credit account and wish it were possible to do this for you at this time.

Your application for credit has been reviewed and at the present time we may not open an account for you. Our decision was according to our usual policies, and was based solely on information you supplied to us.

Since we are unable to open an account for you and you undoubtedly want some or all of the merchandise you selected, we will accept a cash or a C.O.D. order (25% down payment required on C.O.D.) for everything you need now. This will enable you to take advantage of the excellent values you selected.

Thanks again for thinking of Aldens.

ALDENS, INC.

Charles Arthur

CHARLES ARTHUR
New Account Manager

2104 BP

CA:TDA
ENC: c.o.

YOUR FILE NO. _____

If you have any questions concerning our decision, please return this letter and your order, or refer to your file number.

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT E
"CLTD Letter"

Your recent letter was referred to me for personal attention.

We are unable to determine the exact reason why your application was not approved. Records are kept by us to facilitate answering letters from our customers, but unfortunately, we cannot locate any information regarding your recent application.

Therefore, won't you please fill out the enclosed application, including your order and return it to us in the postage free envelope enclosed. It will be a real pleasure to process your application and order. Notification will be sent promptly with regard to disposition of your request for an account.

We would like to thank you for bringing this matter to our attention and are awaiting your reply.

ALDENS, INC.

Charles Arthur

CHARLES ARTHUR
New Account Manager

CA:CT
CLTD

ENC: Application
BRE

P.S. Please return this letter with your original order and application.

EXHIBIT F
"CBX Letter"

ALDENS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60650

We regret very much that we were unable to open a Credit Account for you with the enclosed order.

This decision was based upon information contained in a Consumer Credit Report we requested from:

Meanwhile, as you undoubtedly want some or all of the merchandise you selected, why not send us a cash order as so many of our customers do. This will still enable you to take advantage of our excellent values.

Your interest in Aldens is sincerely appreciated and we hope to serve you in the near future.

ALDENS, INC.

Charles Arthur

CHARLES ARTHUR
New Account Manager

FILE NO.
CA:CBX
ENC:C.O.
2170

EXHIBIT C

"CBY Letter"

ALDENS 5000 WEST ROOSEVELT ROAD CHICAGO, ILLINOIS 60607

We regret very much that we were unable to open a Credit Account for you with the enclosed order.

This decision was based upon information contained in a Consumer Credit Report we requested from the Western Cook County Credit Bureau - AMO, P.O. Box 2121, Oak Park, Illinois. They obtained the report from:

Meanwhile, as you undoubtedly want some or all of the merchandise you selected, why not send us a cash order as so many of our customers do. This will still enable you to take advantage of our excellent values.

Your interest in Aldens is sincerely appreciated and we hope to serve you in the near future.

ALDENS, INC.

Charles Arthur

CHARLES ARTHUR
New Account Manager

R FILE NO._____

CA:CBY
IF YOU HAVE ANY QUESTIONS
CALL/WRITE OUR CREDIT DEPT.
REFERENCE THIS LETTER
YOUR ORDER OR BILL
YOUR FILE NUMBER.

EXHIBIT E

"CBRU Letter"

TELEPHONE NUMBER

We regret very much ... Credit Account for you with the enclosed order.

This decision was based upon information contained in a Consumer Credit Report we requested from The Western Cook County Credit Bureau - AMC, P.O. Box 2121, Oak Park, Illinois. They obtained the report from:

Meanwhile, as you undoubtedly want some or all of the merchandise you selected, why not send us a cash or C.O.D. order (25% down payment required on C.O.D. orders) as so many of our customers do. This will still enable you to take advantage of our excellent values.

Your interest in Aldens is sincerely appreciated and we hope to serve you in the near future.

ALDENS, INC.

Charles Arthur

CHARLES ARTHUR
New Account Manager

CA:CBRU

ENC:C.O. YOUR FILE NO. _____

2149 If you have any questions concerning our decision, please return this letter and your order, or refer to your file number.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Equal Credit Opportunity Act, the Fair Credit Reporting Act and the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the facts as alleged in the complaint are true or that any law has been violated, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect; and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its rules, now in further conformity with the procedures prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

Proposed respondent Aldens, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 5000 West Roosevelt Road, Chicago, Illinois.

The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent and the proceeding is in the public interest.

Order

Definitions: For the purposes of this order the following definitions are applicable:

(a) "Regulation B" shall refer to that version of Regulation B (12 C.F.R. 202) of the Equal Credit Opportunity Act, 15 U.S.C. 1691-

1691e, as amended by Pub. Law No. 94-239, in effect on and after March 23, 1977.

(b) The terms "account," "applicant," "application," "contractually liable," "consumer credit," "creditor," "credit transaction," "discriminate against an applicant," "inadvertent error," "marital status" and "open end credit" shall be defined as provided by Section 202.2 of Regulation B.

(c) The terms "consumer report" and "consumer reporting agency" shall be defined as provided in Sections 603(d) and 603(f), respectively, of the Fair Credit Reporting Act (15 U.S.C. 1681a(d) and (f)(1970)).

ORDER I

It is ordered, That respondent Aldens, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with every application for consumer credit do forthwith cease and desist from:

1. Discriminating against applicants for credit on the basis of sex or marital status with respect to any aspect of a credit transaction in violation of Section 202.4 of Regulation B.

2. Taking sex or marital status into account in a credit scoring system or other method of evaluating applications in violation of Section 202.6 (b)(1) of Regulation B.

3. Failing to consider child support payments, where disclosed by the applicant as income in evaluating applications, to the extent that such payments are likely to be consistently made, as required by Section 202.6(b)(5) of Regulation B.

4. Requesting, where the applicant applies for an unsecured separate account in a state other than a community property state, the name of the applicant's spouse in violation of Section 202.5(d)(1) of Regulation B.

5. Requesting or considering information concerning an applicant's spouse (or former spouse under (e) below) unless:

(a) the spouse will be permitted to use the account; or

(b) the spouse will be contractually liable upon the account; or

(c) the applicant is relying in the spouse's income as a basis for repayment of the credit requested; or

(d) the applicant resides in a community property state or property upon which an applicant is relying as a basis for repayment of the credit requested is located in such a state; or

(e) the applicant is relying on alimony, child support or separate

maintenance payments from a spouse or former spouse as a basis of repayment of the credit requested,

in violation of Section 202.5 (c) of Regulation B.

6. Failing to preserve records including (1) written consumer reports received from consumer reporting agencies, (2) worksheets on which information given orally by a consumer reporting agency concerning the applicant's credit history was recorded by respondent's employees, (3) worksheets on which information concerning the applicant derived from telephone calls to various natural persons, corporations and partnerships was recorded by respondent's employees and (4) written documents on which the points assigned by respondent's point scoring system to applicant's answers to various items on the Aldens charge application were recorded by respondent's employees, as required by Section 202.12 of Regulation B.

7. Failing to provide applicants against whom adverse action is taken with a statement of specific reasons for the action taken, either at the time of notifying the applicant of such action or within 30 days of receiving an oral or written request for the reasons from the applicant within 60 days of notification of adverse action, as required by Section 202.9 of Regulation B.

(a) *Provided,* that if respondent cannot locate the applicant's file after good faith efforts because the applicant did not supply the file number assigned to that application, the respondent shall be deemed to be in compliance with the provisions of this paragraph only if it had clearly and conspicuously advised the applicant in the notification of adverse action of the file number and that the respondent will be unable to furnish the reason(s) for denial unless the applicant furnishes the file number with the request for reasons. Where respondent is unable to locate the applicant's file as a result of the applicant's failure to supply the file number with the request for reasons, the respondent shall so notify the applicant of that fact.

(b) Respondent shall not be deemed to have violated the requirements of this paragraph if it cannot locate the applicant's file after good faith efforts because of an inadvertent error; *provided,* that, (1) the respondent so notifies the applicant, and (2) upon discovering the error the respondent corrects it as soon as possible and commences compliance with this paragraph.

(c) *Provided further,* that where an application for credit is denied by respondent based on the failure of the applicant to obtain a sufficient number of points under a point scoring system, a

statement of the specific reasons for the action taken complies with this paragraph only if it includes:

(i) A brief explanation of respondent's point scoring system which informs the applicant that: (1) the system assigns a value to a number of different creditworthiness criteria taken from the face of the application or other sources, (2) the applicant's total score on all criteria determines whether respondent will grant or deny credit, and (3) the factor(s) disclosed are those which most significantly affected the respondent's decision (an example of an explanation that complies with this subparagraph is set forth in Appendix A; an explanation which is substantially similar to Appendix A will be considered to be in compliance with the provisions of this subparagraph to the extent to which it accurately describes respondent's scoring system); and

(ii) the criteria, not fewer than four (4), in respondent's point scoring system which most significantly affected respondent's adverse decision, except that (1) disclosure of a single criterion complies with this paragraph if that criterion would cause an adverse decision were the applicant to achieve a maximum rating on the other criteria used in evaluating applicants, and (2) respondent shall not disclose a criterion on which the applicant scored the maximum number of points even if this results in the disclosure of fewer than four criteria. For the purpose of this paragraph (7) the term "criterion" means any item of information to which the respondent assigns points, for example, "length of employment" and "no telephone at residence." The most significant criteria are to be determined by selecting the criteria which produced the greatest differential between the applicant's score and the maximum number of points obtainable for each criterion. Respondent shall not be deemed to have violated the requirements of this paragraph if it does not list the criteria which most significantly affected respondent's adverse decision because of an inadvertent error.

(d) Respondent shall notify the Commission if within ten (10) years from the effective date of this order it changes the credit scoring system in use at the time of execution of this order in a manner which would materially affect the accurancy of the reasons provided under subparagraph 7(c)(ii); *provided,* that any changes in respondent's credit scoring system (*e.g.,* addition or deletion of specific criteria, increase or reduction of the points assigned to specific criteria) which are made in good faith to adjust respondent's bad debt losses, to reduce respondent's operating expenses, or to increase the availability of credit shall be presumed not to materially affect the accuracy of reasons given under subparagraph 7(c)(ii).

(e) *Provided further,* that subsequent approval of an application which respondent initially denied shall not relieve respondent of its obligation to provide the statement of specific reasons for the initial denial as required by Section 202.9 of Regulation B and this paragraph.

8. Failing to provide a statement of the reason(s) for denial as set forth in Paragraph 7, above, to all applicants who were denied credit and requested the reason(s) for denial during the period January 31, 1976 through March 22, 1977.

(a) *Provided,* that if respondent subsequently opened an account for any applicant who was denied credit and requested the reason(s) for denial during the period from January 31, 1976 through March 22, 1977, respondent shall not be required to furnish such applicants the reason(s) for denial provided for in this paragraph if the applicant expressly accepted the account through acceptance of merchandise ordered on the account or submission of subsequent orders for merchandise.

9. Failing to review the applications of all persons employed as waitresses who were denied credit during the period October 28, 1975, through March 22, 1977, and send such applicants by first-class mail a notice in the language and form shown in Appendix B, which shall contain as an enclosure a current Aldens Charge Application. Respondent shall review the charge applications which are mailed to the company in response to the notice letter (Appendix B) according to the credit granting standards in effect at the time that the charge application is received and in effect on August 1, 1976, except that no less than two (2) points shall be awarded for occupation. Respondent shall open accounts for those applicants who qualify under either set of credit granting standards. If the applicant qualifies under both standards, the applicant shall be granted the higher of the two credit limits. Respondent shall send each such applicant a notification of action taken as required by Section 202.9 of Regulation B and a notification of the amount of the credit limit, if any, established on the account.

ORDER II

It is further ordered, That respondent, Aldens, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with any application for credit that is primarily for personal, family or household purposes, and in connection with either the receipt or consideration of any consumer report, do forthwith cease and desist from:

1. Failing whenever credit for personal, family or household purposes involving the consumer is denied either wholly or partly because of information contained in a consumer report from a consumer reporting agency, to so advise the consumer against whom such adverse action has been taken and to supply the name and address of the consumer reporting agency making the report as required by section 615(a) of the Fair Credit Reporting Act.

(a) *Provided,* that respondent shall not be liable for a civil penalty for any violation of this paragraph if:

(i) respondent shows by a preponderance of the evidence that the violation was caused by inadvertent error; and

(ii) upon discovery of the violation the respondent corrects it as soon as possible by sending the notice required by this section to the consumer.

2. Failing to advise each applicant who was denied credit for personal, family or household purposes involving the consumer based in whole or in part on information contained in a consumer report from a consumer reporting agency, for a period of three (3) years prior to the date of execution of this order, of such action and to supply the name and address of the consumer reporting agency making the report as required by section 615(a) of the Fair Credit Reporting Act.

(a) *Provided,* that to the extent that respondent's records reflect that the notice required by section 615(a) of the Fair Credit Reporting Act was previously given to the applicant respondent shall be deemed in compliance with the provision as to such applicants.

(b) *Provided further,* that where the applicant was denied credit on the basis of a "Credit Index" report, respondent shall also advise the applicant that the information used may have concerned items of adverse information relating not to the applicant but to individuals residing at the applicant's address.

It is further ordered, That respondent shall preserve evidence of compliance with the requirements imposed under this order for a period of not less than 25 months after respondent notifies each applicant of the reasons for denial pursuant to Paragraph 8 of Order I, above, the action taken on applications for new accounts pursuant to Paragraph 9 of Order I, above, and the name and address of any consumer reporting agency pursuant to Paragraph 2 of Order II, above. Respondent shall upon request permit the Commission through its duly authorized representatives to inspect such records.

It is further ordered, That respondent shall deliver a copy of this order to cease and desist to all present and future supervisory

employees engaged in reviewing, evaluating or otherwise processing applications for credit.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, arrangement or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall within sixty (60) days after service upon it of this order, file with the Commision a written report setting forth in detail the manner and form in which it has complied with this order. Respondent shall also within one-hundred twenty (120) days after service upon it of this order file with the Commission a supplemental written report setting forth in detail the manner and form in which it has complied with Paragraph 9 of Order I of this order.

APPENDIX A

In reviewing your application Aldens used a credit scoring system that is based on our experience with other applicants. This system assigns points to various items of information on your application [and, as applicable, other sources of the information scored, such as credit reports]. We scored the information which you supplied in your application [or, as applicable, other sources], totaled the points and found that you did not achieve the minimum score required for purchases in the amount requested by your order.

We have listed below the four factors which most significantly affected our decision to deny your application for credit.

APPENDIX B

Ms.
[Street Address]
[City, State]

Dear Ms. _____:

We regret that due to an oversight in our initial evaluation of your recent application for credit, we were unable to open an account for you. Aldens has now modified its credit granting standards and would appreciate the opportunity to review your application for credit again.

Should you desire to open an Aldens Credit Account, please complete and send us the enclosed charge application. We'll evaluate your application and notify you of our decision as soon as possible.

Thank you for considering Aldens.

ALDENS, INC.

CHARLES ARTHUR
New Account Manager

IN THE MATTER OF

SAMUEL E. WOMACK, ET AL. T/A NURSERY BARN, ETC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2939. Complaint, Dec. 1, 1978 — Decision, Dec. 1, 1978

This consent order, among other things, requires three McMinnville, Tenn. firms engaged in the advertising and mail order sale of viable trees and nursery stock, to cease misrepresenting or making unsubstantiated claims regarding the growth, survival and maturity of their stock; or the existence of government standards and inspections for such products. They are required to make specified disclosures in future advertising; include all conditions and qualifications attached to advertised guarantees; enclose a copy of such guarantee with each purchase; fulfill obligations under those guarantees promptly; and make full refunds to customers whose orders have not been shipped in time for the planting cycle. The order additionally requires the companies to make proper restitution to eligible customers from July 1, 1975, whose orders had never been sent or had failed to survive shipment.

Appearances

For the Commission: *Ronald C. Cougill.*
For the respondents: *Jack Paller,* McMinnville, Tenn.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), Morrison Nursery Advertising Company, Inc., and individuals Samuel E. Womack, as an officer of S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), and James E. Savage, as an officer of Morrison Nursery Advertising Company, Inc., and Samuel E. Womack and James E. Savage further doing business as Nursery Barn, Savage Farms Nursery, McMinnville Tree Farm, American Nursery and Seed Company, and Morrison Nursery Company, have violated provisions of said Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Corporate respondent S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), was a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office

and place of business located on Highway 55 in McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements for the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Corporate respondent Womack Nursery Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55 in McMinnville, Tennessee, and is engaged in the sale and offering for sale of trees and nursery stock and is under the exclusive control and direction of individual respondent Samuel E. Womack. Womack Nursery Company, Inc. is a successor corporation to S.W. Advertising Company, Inc. and McMinnville Tree Farm.

Corporate respondent Morrison Nursery Advertising Company, Inc. was a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55 in McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements for the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Individual respondent Samuel E. Womack at relevant times in the past has been an officer of corporate respondent S. W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.). Individual respondent Samuel E. Womack is currently an officer of corporate respondent Womack Nursery Company, Inc. Individual respondent James E. Savage at relevant times in the past has been an officer of corporate respondent Morrison Nursery Advertising Company, Inc. They formulated, directed and controlled the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their addresses are the same as the corporate respondents. Individual respondents are and have been engaged in the advertising, offering for sale, and mail order sales and shipment of nursery stock under the trade names of Nursery Barn, Savage Farms Nursery, McMinnville Tree Farm, American Nursery and Seed Company, and Morrison Nursery Company. All of the foregoing companies were located on Highway 55 in McMinnville, Tennessee.

PAR. 2. In the course and conduct of their businesses, respondents disseminate and cause to be disseminated certain advertisements in newspapers and magazines of general and interstate circulation and by various electronic media broadcasts transmitted in several of the

States of the United States, and now cause and for some time last past have caused their products to be transmitted through the U.S. Mail and other interstate instrumentalities from their place of business in Tennessee to customers in various other states and have made substantial sales to purchasers in various other states, and maintain, and at relevant times in the past have maintained, a substantial course of trade in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 3. Typical and illustrative of the statements in said advertisements, but not all inclusive thereof, are the following:

Trees advertised in your area will grow in your area. It's guaranteed.

We will acknowledge all orders within the expected time for your order to arrive at the proper planting time in your area.

All orders will be acknowledged and shipped at the proper time.

The one tree experts agree will grow anywhere in the U.S.A.

Grows approximately 25–30 feet over a five year period.

Here is our ironclad 3 year guarantee: if by mere chance any of your trees fail to survive, all you have to do is return them to us and we will replace them absolutely free of charge for a three year period.

All items carry a COMPLETE SATISFACTION ON ARRIVAL GUARANTEE or we will REFUND or REPLACE any unsatisfactory item.

Here is our 2-way, ironclad guarantee:

1. If, upon arrival, you are not completely satisfied, then return for a full refund.
2. Free replacement, for any reason, up to three full years.

Each rose is verified by Gov't inspection to be a living plant. Each must bloom or it will be replaced free of charge.

3-way guarantee:

1. All shade trees regardless of number ordered will be 5 to 7 feet tall, and all bonus trees will be 4 to 6 feet. All shipping paid.
2. Trees advertised in your area will live in your area.
3. All trees are guaranteed to live and if by mere chance any fail to live, they will be replaced free of charge.

. . . beautiful shade tree . . . grows up to 5 and 6 feet a year. This 2 in 1 Scarlet Maple grows anywhere . . . . It's guaranteed to grow . . . or money back.

Guarantee

We guarantee to any customer your organization sells to: Free replacement for 3

full years if by mere chance any of their trees fail to live. We will have their name in our records when your organization sends their order in.

PAR. 4. Through the use of such representations disseminated in print and electronic media in many of the several states, respondents have represented and now are representing directly or by implication that:

1. All trees and nursery stock advertised, offered for sale, or sold will grow and survive anywhere in the United States.
2. Trees such as Red Maple (Acer rubrum), Thornless Honey Locust (Gleditsia triacanthos inermis), and Weeping Willow (Salix babylonica) grow five to six feet per year and will be mature shade trees in five years.
3. Rosebushes shipped by respondents and received by the buyer are inspected by the government and verified through such inspection to be living plants and will bloom when planted.
4. A full and complete guaranty or warranty exists on ordered merchandise without condition or qualification.
5. Refund and replacement requests will be honored and the purchase price will be promptly refunded or a prompt replacement tendered.

PAR. 5. In truth and in fact:

1. Not all of the trees advertised are adaptable to the wide range of climatic conditions in the United States.
2. Red Maple (Acer rubrum), Thornless Honey Locust (Gleditsia triacanthos inermis) and Weeping Willow (Salix babylonica) trees do not average five to six feet of growth per year. In fact, under optimum conditions, the yearly growth rate for such trees is less than three feet.
3. Rosebushes are not inspected by the government to verify them to be living plants.
4. A full and complete unconditional guaranty or warranty does not exist. The buyer is obligated to return, at his own expense, the nursery stock for which a refund or replacement is requested.
5. Refund and replacement requests are not timely honored and payment of refunds in many instances is not made.

The statements and representations set forth in Paragraph Four were and are false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 6. In the course and conduct of their business, respondents have represented in advertisements, as hereinbefore described, the

existence of a "money back refund" and a replacement guaranty for two to three years, but have failed to:

1. Provide a copy of the guarantee or warranty with the shipment of trees and nursery stock. In many instances, purchasers are unable to exercise their rights under the offered guarantee or warranty due to lack of recollection of such terms which appeared in the advertisement some months prior to time of delivery of the ordered stock.

2. Adhere to the terms and provisions of the advertised guarantee or warranty. In certain instances, refund and replacement requests are not honored and performed by respondents and refunds and replacements are not made.

3. Disclose in a clear and conspicuous manner the necessary conditions precedent to obtaining a refund or replacement and the manner in which respondents will perform. In many cases, respondents have represented "free replacement" without disclosing in the same advertisement that return of the shipped nursery stock is an expense to the purchaser. Respondents' failure to disclose all conditions incident to and all expenses to be incurred by the purchaser is a failure to disclose material facts which, if known, would likely affect consumer decisions to purchase.

The aforesaid failures constitute unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 7. In the further course and conduct of their business and in furtherance of their marketing program, respondents in the advertising, offering for sale and mail order sales of nursery stock have engaged in the following additional unfair and deceptive acts and practices:

1. Conditioning a refund, replacement or other warranty offer to the time of product arrival. The average purchaser cannot determine the viability of dormant nursery stock and therefore is not likely to determine warranty coverage and to exercise the offered warranty provision.

2. In certain instances have labeled rosebushes incorrectly and such incorrect labeling is not discernible to the public under ordinary circumstances. Respondents do not employ and follow reasonable systems and procedures to assure the correct labeling of shipped rosebushes.

3. In certain instances have failed to ship the ordered trees and nursery stock to the purchaser within a reasonable time to insure

arrival for use in the planting and cultivation period nearest the date of the received order.

4. Have failed to provide purchasers with a notice of inability to effect timely shipment; that is, within the planting and cultivation period nearest the date of receipt of order.

5. Have failed to make prompt payment of refunds to purchasers when timely shipment is not made.

6. Have shipped and caused to be delivered trees and nursery stock which are not living or viable. As a result of having shipped or caused to be delivered trees and nursery stock which are not living or viable, respondents have failed to disclose in print and electronic media advertising information to enable the reader to realize that portions of mail order shipments of trees and nursery stock may contain trees and nursery stock which are dead or nonviable and will not survive. Such information is a material factor in the purchase decision and is material to determine the adequacy of any offered warranty.

Therefore, the acts and practices as set forth in Paragraph Seven hereof were and are unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 8. The use by respondents of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices has the capacity and tendency to mislead members of the purchasing public into the mistaken belief that said statements and representations are true, and to induce such persons to purchase from respondents substantial quantities of advertised merchandise.

PAR. 9. In the course and conduct of the businesses, and at all times relevant herein, respondents are in substantial competition in commerce with corporations, partnerships, firms and individuals in the mail order and retail merchandising of nursery stock.

PAR. 10. The acts and practices of respondents as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

. The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a

copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended;

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Corporate respondent S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), was a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located on Highway 55, McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements for the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Corporate respondent Womack Nursery Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55 in McMinnville, Tennessee, and is engaged in the sale and offering for sale of trees and nursery stock and is under the exclusive control and direction of individual respondent Samuel E. Womack. Womack Nursery Company, Inc. is a successor corporation to S.W. Advertising Company, Inc. and McMinnville Tree Farm.

Corporate respondent Morrison Nursery Advertising Company, Inc. was a corporation organized, existing and doing business under

and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55, McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements of the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Individual respondent Samuel E. Womack at relevant times in the past has been an officer of corporate respondent S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.). Individual respondent Samuel E. Womack is currently an officer of corporate respondent Womack Nursery Company, Inc. Individual respondent James E. Savage at relevant times in the past has been an officer of corporate respondent Morrison Nursery Advertising Company, Inc. They formulated, directed and controlled the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their addresses are the same as the corporate respondents. Individual respondents are and have been engaged in the advertising, offering for sale, and mail order sales and shipment of nursery stock under the trade names of Nursery Barn, Savage Farms Nursery, McMinnville Tree Farm, American Nursery and Seed Company, and Morrison Nursery Company. All of the foregoing companies were located on Highway 55 in McMinnville, Tennessee.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), Morrison Nursery Advertising Company, Inc., and Womack Nursery Co., Inc., corporations, their successors and assigns, and their officers, and Samuel E. Womack and James E. Savage, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of trees, nursery stock or any other product in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually or in any other manner, directly or by implication, that:

1. Advertised trees or nursery stock of any kind will grow and survive anywhere in the United States or in any specific geographic area of the United States unless respondents have a reasonable basis to conclude that such representation has a basis in fact and supported by reputable industry authority;

2. Trees, such as Red Maple (Acer rubrum), Thornless Honey Locust (Gleditsia triacanthos intermis), and Weeping Willow (Salix babylonica) or any other tree or nursery stock, under normal growing conditions, will grow five to six feet per year or at any other growth rate or will be mature shade trees or mature nursery stock in five years or in any other time period unless respondents have a reasonable basis to conclude that such representation has a basis in fact and is supported by reputable industry authority;

3. Rosebushes have been officially inspected for compliance with a government viability standard or that such a standard exists;

4. A prompt refund or replacement will be made unless respondents can establish the maintenance of business records sufficient to support a showing of compliance with all such representations; and

5. A full and complete guaranty or warranty without conditions or qualifications exists unless such is the fact.

B. Failing to include in each shipment of trees and nursery stock a written copy of any written guaranty or warranty advertised by respondents disclosing all terms and conditions, if any, and identity and address of guarantor.

C. Failing to promptly and fully perform all of their obligations under the terms of all warranties, whether express or implied.

D. Failing to disclose clearly and conspicuously in all advertisements representing a written guaranty or warranty, the manner in which respondents will perform and all the conditions, including the allocation of cost and expense, necessary for the prompt payment of a refund or replacement. Such disclosure shall be prominently displayed in close proximity to the representation of a guaranty or warranty and in all advertisements broadcast by radio or television, the above required disclosure shall be read at the end of the advertisement at a rate of speed at least as slow as the slowest part of the advertisement. Nothing in this order shall be construed to relieve respondents of their duty to comply with all present and future laws, regulations and rules dealing with warranties and guaranties.

E. Limiting any guaranty or offer to refund or replacement to the time of arrival of the ordered merchandise.

F. Mislabeling rosebushes and failing to employ and utilize

reasonable business systems and procedures to insure the correct labeling of the varieties of rosebushes shipped to the buyer.

G. Failing in each advertisement to disclose clearly and conspicuously the planting period appropriate for the geographic area in which the advertisement is published.

H. Failing to make shipment of viable trees and nursery stock for timely arrival; that is, in time for receipt during the current or next planting period appropriate for the geographic area in which the buyer orders shipment.

I. Failing to pay, without prior demand, and no later than twenty (20) days after the conclusion of the appropriate planting period for the ordered trees and nursery stock, a refund of all monies received from the buyer in the event timely shipment of viable trees and nursery stock is not made as referenced in Paragraph H. If partial orders are timely shipped, this paragraph shall require the refund of monies received only for the portion of the order not timely shipped.

J. Failing to include in all print (including but not limited to direct mail solicitations) and electronic media advertising wherein no express warranty or an express warranty offering other than a full refund of monies paid, is made the following verbatim notice: "WARNING: Due to the natural character of trees and nursery stock, mail order shipments may contain trees and nursery stock which are dead or non-viable and will not survive. Loss of a portion of any order of trees and nursery stock when ordered through the mail is not uncommon. Consult the warranty offered by any mail order nurseryman to determine the degree of protection afforded against such loss."

Said notice shall be prominently and conspicuously placed and in 10 point boldface print in proximity to such warranty and shall not be contradicted directly or by implication by any other statement in the advertisement.

It is further ordered:

A. That if respondents advertise at any time within two (2) years of the date this order becomes final in any newspaper, magazine or other printed media (exclusive of direct mail solicitations) or on radio, television or other electronic media, for the sale of trees and nursery stock, respondents shall place or cause to be placed, in a clear and conspicuous manner, in such media and in each print and electronic media where respondents advertised during the period of July 1, 1975 to the date this order becomes final, the following quoted

notice, causing said notice to appear or be broadcast in each said media on at least four (4) separate instances:

NOTICE TO PAST PURCHASERS of American Nursery and Seed Company, Nursery Barn, McMinnville Tree Farm and Morrison Nursery Company. In order to satisfy our past guarantees, we will honor and pay within thirty days of receipt all requests for refunds for purchases since July 1, 1975 if you received trees and nursery stock which did not survive or failed to receive your order. Please send proof of purchase with any request.
(Signature of applicable Individual Respondent)

B. That respondent shall pay, within thirty (30) days of receipt of request for refund, the full purchase price as evidenced by the purchaser's proof of purchase, without deduction, to all purchasers who purchased trees and nursery stock from respondents during the period July 1, 1975 to the date this order becomes final. *Provided, however,* that the total sum to be paid in restitution under this paragraph of the order shall not be greater than two hundred thousand dollars ($200,000). Respondents shall evenly divide the refund payment responsibility for all requests for refunds for American Nursery and Seed Company, Nursery Barn, McMinnville Tree Farm and Morrison Nursery Company. Said payments of requested refunds shall be limited to those requests for refunds received within ninety (90) days of the date this order becomes final and when requests are accompanied by proof of purchase in the form of a cancelled check or money order receipt or both. *Further provided,* this obligation to refund shall be extended for each respondent beyond the date this order becomes final when that respondent begins advertising as described in Paragraph A above, and in that event, this obligation shall be limited to requests for refunds received within thirty (30) days of the last date of media advertising required in Paragraph A above, when accompanied by proof of purchase in the form of a cancelled check or money order receipt or both.

C. That respondents shall maintain and allow inspection and copying by the Federal Trade Commission records which show reasonable efforts to comply with the provisions of foregoing Paragraph A through B.

It is further ordered, That respondents shall, for a period of three (3) years subsequent to the date of this order:

A. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order and any evidence of the results of such efforts, including all customer orders, complaints received and disposition of same,

records of all requests for refunds and replacements and disposition of same. Said records shall, upon reasonable notice, be made available to the Federal Trade Commission for inspection and copying.

B. Maintain records or other documentary proof establishing timely and accurate shipment of viable trees and nursery stock or other merchandise. Said records shall, upon reasonable notice be made available to the Federal Trade Commission for inspection and copying.

C. Maintain and furnish to the Federal Trade Commission, upon request, copies of all disseminated advertisements, along with:

1. Records disclosing the date(s) such advertisements were published;
2. Records disclosing the name and address of the newspaper, broadcast media, in which said advertisement was published; and
3. Scripts of each advertisement published.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten (10) years from the effective date of this order, each individual respondent shall promptly notify the Commission of each affiliation with a new business or employment or use of new trade style. Each such notice shall include respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of the respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

FORD MOTOR COMPANY

Docket 9105. Interlocutory Order, Dec. 4, 1978

ORDER REQUESTING FILING OF ADDITIONAL BRIEFS

By motion of November 7, 1978, complaint counsel has requested that the Commission seek a preliminary injunction compelling Ford Motor Company to disclose certain facts concerning 1974–78 model year four-cylinder vehicles which complaint counsel alleges are afflicted with a latent defect resulting in premature camshaft/rocker arm wear. Ford subsequently filed an opposition to that motion and, in a supplement thereto filed on November 29, 1978, informed the Commission of certain steps it was taking to notify affected owners of the problem. Ford alleges that this action further supports Ford's position that the proposed injunction action would not be in the public interest. Ford further described its intended notification and adjustment program in a motion filed on November 30, 1978, in which it reiterated certain concerns regarding the possible occurrence of *ex parte* communications in violation of Section 4.7 of the Commission's Rules of Practice.

Before any action is taken with respect to complaint counsel's motion, and in order to assess Ford's contention that its intended notification and adjustment program indicates that the proposed injunction action is not in the public interest, the Commission would like to receive further information regarding the precise parameters of respondent's program including the existence of any conditions attached to that program.[1] The Commission particularly requests respondent to submit the text of the letter which Ford proposes to send to vehicle owners, indicating when such letter will be mailed. Ford should describe with specificity the categories of individuals to whom the letter will be sent, indicating whether prospective purchasers of new and used vehicles from Ford dealers will be notified. If respondent's intended rocker arm/camshaft notification and adjustment program differs from the program instituted in 1977 with respect to piston scuffing, the reason for such differences should be provided. The Commission also requests a copy of any instructions sent to Ford dealers advising them of the adjustment program, in addition to the mailgram attached to respondent's filing of November 3, 1978. Accordingly,

[1] While an oral hearing before the Commission would suffice to inform the Commission of the details of Ford's program without raising *ex parte* difficulties, it is the Commission's view that the requisite information can be obtained through additional briefs and that a hearing is unwarranted at this time.

It is ordered, That respondent is requested to file a supplemental brief on or before December 11, 1978, and that complaint counsel may file a response thereto on or before three days following service of respondent's supplemental brief.

277-685 O—79——60

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Dec. 8, 1978

This order remands this matter for appointment of a substitute ALJ to preside over further proceedings; directs the filing of briefs by all parties; dismisses as moot motions for disqualification of the Chairman from participation and the motion for evidentiary hearing or oral argument; denies motion for issuance of subpoenas; and terminates a stay of proceedings entered October 20, 1978.

ORDER

At the present time, the Commission has before it respondents' motions to disqualify the administrative law judge, Kellogg's motion for an evidentiary hearing, or, alternatively, for oral argument on its disqualification motion, Kellogg's motion (joined by General Mills) for the issuance of subpoenas *duces tecum,* complaint counsel's motion seeking the appointment of a substitute administrative law judge and an order directing that the proceedings be resumed "from the point at which Administrative Law Judge Harry R. Hinkes retired," and a motion for dismissal or other alternative relief filed by General Mills.

I.

After a careful review of the submissions of the parties and the pertinent legal authorities, the Commission has concluded that Judge Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) upon his retirement on September 8, 1978. Because his reappointment on a contractual basis was not approved by the Civil Service Commission, see 5 U.S.C. 1305 and 3105, and Civil Service Commission regulations adopted pursuant thereto, his service subsequent to September 8, 1978, once objected to by respondents, *cf. United States* v. *L. A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37–38 (1952), was of questionable validity. Accordingly, and in view of the Chairman's determination not to seek Civil Service Commission approval of the existing contractual arrangement or any other employment arrangement with Judge Hinkes, the matter must be remanded for the appointment of a substitute ALJ to preside over further proceedings. Therefore, respondents' motions requesting Judge Hinkes' disqualification are dismissed as moot. Kellogg's motion for an evidentiary hearing, or, in the alternative, for oral argument is also dismissed as moot.

Complaint counsel have requested the Commission to include a

directive to the substitute ALJ to proceed to the conclusion of the hearings, to base his assessment of the need for *de novo* hearings on the proposed findings and the record, and to recall witnesses if he concludes "that observation of the demeanor of the particular witnesses is likely to be of material assistance in making findings of controlling facts." The parties have addressed the legal precedents regarding the extent, if any, to which retrial may be necessary.

The Commission agrees with the parties that the ALJ should decide in the first instance the issues associated with the future conduct of these proceedings and whether portions of the record or particular witnesses, if any, will need to be reheard. To facilitate the law judge's consideration of the questions raised here, as well as ultimate Commission review, the parties are ordered to submit to the substitute ALJ, within forty-five (45) days from this order, briefs responding to the following questions, as well as any other legal or factual matters that the submitting party may deem relevant to the issue of whether retrial is required and, if so, to what extent. In addressing these matters, consideration should be given to the application of principles enunciated in recent precedents such as *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519 (1978), and *New England Coalition on Nuclear Pollution* v. *NRC,* 582 F.2d 87 (1st Cir. 1978).

1. Identify the issues in the proceeding whose resolution depends upon an evaluation of credibility and with respect to which it is important to preserve demeanor evidence.

2. With respect to the issues identified in No. 1 above, identify each witness pertinent to each issue and the location in the record where demeanor evidence would materially assist in determining credibility. Indicate why the demeanor of such witness is crucial to resolution of the issue so identified.

3. Assuming that certain witnesses should be recalled, would it be sufficient to recall them merely for the purpose of cross-examination?

4. Assuming that certain witnesses should be recalled for purposes of direct testimony and cross-examination, could such further appearances be limited to certain aspects of their testimony?

Appropriate replies, if any, shall be within the discretion of the substitute ALJ.

In ordering such briefing, we do not intend to imply that the substitute ALJ is obliged to make definitive determinations before proceeding with the hearings concerning the extent to which, if at all, the recall of any particular witness is required or desirable. As

we have noted, all such issues are matters for the ALJ to address in the first instance.

In replying to complaint counsel, Kellogg has requested the Commission "to afford respondents a reasonable length of time following the ruling (*e.g.*, 30 days) to file additional disqualification motions before the Commission * * * appoints a substitute judge * * *." To the extent that this request may be deemed an application for a stay, it is denied, and the stay of proceedings ordered by the Commission on October 20, 1978, is hereby terminated. To the extent that the motion filed by General Mills on November 29, 1978, is not disposed of by this order, it will be acted upon by the Commission subsequent to the expiration of the time for the filing of responses.

II.

By motion of September 22, 1978, Kellogg, joined by General Mills on September 27, 1978, requested the issuance of subpoenas *duces tecum* requiring the Federal Trade Commission and the Civil Service Commission to produce: "(1) documents referring or relating to the retirement of Administrative Law Judge Harry R. Hinkes and the retention of his services by the Federal Trade Commission thereafter, and (2) documents sufficient to show any rules, regulations, guidelines and policies concerning status of administrative law judges and the retention of the services of retired administrative law judges." On October 4, 1978, this motion was certified to the Commission.

In its accompanying memorandum, Kellogg asserts that a statement by Judge Hinkes announcing his retirement and retention "inevitably raise[s] serious questions as to whether the present status of the Administrative Law Judge presiding in this matter is in conformance with statutes and regulations intended to ensure the independence of administrative law judges and is consistent with the requirements of due process. * * * Their resolution requires a clear understanding of the facts concerning Judge Hinkes' change in status." Kellogg further asserts that the requested subpoenas are "clearly relevant to the resolution of the question presented." However, in light of the Commission's disposition, *supra*, of the disqualification motions, the "question" concerning which Kellogg sought the subpoenas is no longer presented. Because the necessity and relevancy requirements of Rules of Practice 3.36 and 3.37 are not satisfied, the motion is denied.

Nevertheless, to clarify the record in this proceeding, appended hereto is a statement by Chairman Pertschuk, memorializing his role in the decisionmaking process that resulted in the contract. No

other Commissioner had any involvement with, or knowledge of, that process. Also appended, in their entirety, are three memoranda to or from Chairman Pertschuk or a member of his staff concerning the continued service of Judge Hinkes in the event he retired. There are no other such memoranda involving Chairman Pertschuk or any other Commissioner.

III.

It is ordered, That (1) this matter is remanded for appointment of a substitute ALJ to preside over further proceedings;

(2) the parties are directed to file the briefs described above within forty-five days with replies to be within the discretion of the ALJ;

(3) respondents' motions seeking disqualification and Kellogg's motion for an evidentiary hearing or oral argument are dismissed as moot;

(4) Kellogg's motion for issuance of subpoenas is denied; and

(5) the stay entered on October 20, 1978, is terminated.

Commissioner Pitofsky did not participate.

SEPARATE STATEMENT OF CHAIRMAN PERTSCHUK

I think it important that I set forth for the record the role that I played in approving the contractual arrangement with Judge Hinkes that is challenged by the motions before the Commission and my reasons for initially approving the arrangement.

As is apparent from Chief ALJ Hanscom's memorandum to me dated August 16, 1978, the full text of which is released today Judge Hinkes had indicated his intention to retire effective August 31, 1978, for personal reasons including the fact that the difference between his take home salary and the amount he would receive in retirement was not, in his opinion, sufficient to justify his continuing in regular service. Chief Judge Hanscom recommended that I authorize the offering to Judge Hinkes of an arrangement whereby Judge Hinkes would be retained under contract to complete the *Kellogg* case after his retirement. After being advised that the arrangement was legally permissible and had been cleared with the Civil Service Commission, I authorized Chief Judge Hanscom to extend the offer to Judge Hinkes, as is evidenced by the memorandum dated August 21, 1978, from my attorney advisor, William J. Baer, to Chief Judge Hanscom. That authorization involved an administrative decision within my authority as Chairman pursuant to Reorganization Plan No. 8 of 1950, 64 Stat. 1264, and did not require the participation of the full Commission. *The Hearst*

Corporation, Dkt. 8832, 81 F.T.C. 1028(1972). I did not seek approval of the other Commissioners, nor to my knowledge did any other Commissioner participate in the matter.

I also wish to note for the record that after the offer had been made to Judge Hinkes, my staff informed me that Judge Hinkes had requested that I personally communicate to him my authorization of the arrangement. I telephoned Judge Hinkes and in a very brief conversation indicated only that I hoped he would accept the contractual arrangement and complete the case. Judge Hinkes responded that he would consider the request. I did not discuss with Judge Hinkes the merits of the case, the manner in which he might proceed with the case, or anything else concerning the proceeding.

I authorized extension of the offer to Judge Hinkes for the following reasons: (1) he had presided over the *Kellogg* case since the complaint had been issued in April 1972, and was therefore familiar with the extensive record of the case; (2) appointment of a substitute was likely to have resulted in a substantial loss of time required by his review of the already extensive record in the case; and (3) with a substitute ALJ issues would likely arise concerning the extent to which, if at all, the new ALJ was obliged or might wish to rehear witnesses who had testified. These are the sole factors on which my decision was based. In no way was my decision influenced by a belief that Judge Hinkes had been or would be in some manner more favorable to one side than the other. Understanding as I did that the arrangement with Judge Hinkes presented no legal problems, I concluded that the potential benefit to all concerned in having the case concluded in a manner that did not entail significant delays and burdens on the parties justified that arrangement to retain the services of Judge Hinkes.

After reviewing the briefs of the parties, however, I have come to the conclusions that Judge Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) upon his retirement on September 8, 1978, and that because his reappointment on a contractual basis was not approved by the Civil Service Commission, his service subsequent to September 8, 1978, once objected to by respondents, was of questionable validity. In light of the substantial legal questions now raised and the fact that none of the parties desires to have Judge Hinkes continue to preside and evidently all are willing to forgo the benefits of having him continue, *i.e.,* potential savings in costs and time, I have determined not to seek Civil Service Commission approval of the existing contractual arrangement or some other employment arrangement with Judge Hinkes.

MEMORANDUM

DATE: August 16, 1978
REPLY TO
ATTN OF: Daniel H. Hanscom,
Chief Administrative Law Judge
SUBJECT: Retention of Administrative Law Judge
Harry R. Hinkes on Contract Basis
TO: Chairman Pertschuk

Judge Harry R. Hinkes has advised that he intends to retire as of August 31, 1978. His stated reason for retiring is age, length of service and to take advantage of the 4.9 percent cost-of-living bonus which will be given to employees who retire by that date. He is 68 years of age and the difference between the retirement he will receive and his present take home pay will be approximately $3,500 per year for the first one and one-half years of his retirement when his retirement income will be tax free. He does not feel justified at his age in working for the next year and one-half for this small difference in take home pay.

Judge Hinkes joined the Federal government service on February 10, 1945. Thus, he is now in his thirty-third year of service. He first joined the FTC on August 23, 1959 as a Hearing Examiner. He was transferred to the NLRB on May 22, 1965, and returned to the FTC January 23, 1972.

Judge Hinkes is the presiding judge in the *Kellogg* case. He was assigned this matter on April 26, 1972, before I became Chief Administrative Law Judge. Because of extensive requirements for discovery in this case, complaint counsel were unable to begin trial until April 28, 1976. As the case now stands, the defense is approximately one-half completed, which will probably be followed by complaint counsel's rebuttal and defense surrebuttal. Judge Hinkes estimates that the trial will be completed early next year, and he anticipates filing an initial decision by the end of 1979 or early 1980.

The trial record now exceeds 36,000 pages, with approximately 10,000 additional pages remaining to be heard. Well over one hundred witnesses have already testified, including a number of economic experts. As you are aware, this is a highly complex proceeding. I believe we have no alternative but to retain Judge Hinkes to complete this case and file an initial decision. Assignment to a new law judge at this juncture could raise serious problems.

As I see it the only way to retain Judge Hinkes is to offer him a contract to complete the *Kellogg* case. While it has been suggested that Judge Hinkes might be retained as a rehired annuitant, the pay

involved—the difference between his retirement pay and his normal salary would make no significant difference in his current "take-home" and is not sufficient to interest Judge Hinkes. Under a contract basis we would retain Judge Hinkes for $150 per day. The total cost would be between $25,000 and $30,000. We believe Judge Hinkes would continue on the *Kellogg* case on this basis. The cost, in my opinion, is warranted under the circumstances.

Accordingly, we recommend and ask authorization to offer Judge Hinkes a contract according to the foregoing terms. Approval is needed by August 27, 1978 before Judge Hinkes retires.

Respectfully submitted,

/s/ Daniel H. Hanscom
Chief Administrative Law Judge

FTC 4-3

FEDERAL TRADE COMMISSION
OFFICE OF THE CHAIRMAN

TRANSMITTAL SLIP

TO:
Judge Hanscom

FROM:
Bill Baer BB

DATE: August 21, 1978

- ☐ Please prepare reply for Chairman's Signature
- ☐ Please see me
- ☐ Approval
- ☐ Recommendation
- ☐ Information
- ☐ Necessary action
- ☐ Note and return
- ☐ File

REMARKS:

Mike says that, as usual, you recommend the most appropriate course. I thought you might want something more official for the record. Thus the attached.

August 21, 1978

MEMORANDUM

TO: Daniel Hanscom

FROM: William J. Baer

The Chairman asked that I respond to your August 16, 1978 memo with respect to Judge Hinkes. He agrees with your recommendation and hereby authorizes you to extend Judge Hinkes a contract to complete the adjudicative matter over which he currently is presiding.

cc: √Margery Waxman Smith
Micheal Sohn

FEDERAL TRADE COMMISSION
RECEIVED
AUG 22 1978
Assistant Executive Director
FOR MANAGEMENT

IN THE MATTER OF

HARNISCHFEGER CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 9107. Complaint, March 10, 1978 — Decision, Dec. 8, 1978

This consent order, among other things, requires a Brookfield, Wis. manufacturer of lattice-boom cranes and the Northwest Engineering Company, a Green Bay, Wis. competitor, to provide the F.T.C. with evidence that all merger agreements between them have been terminated; and return all confidential documents exchanged during negotiations. The order prohibits respondents from acquiring any part of each other's lattice-boom business until July 31, 1981 without furnishing the Commission with 60 days' notice of such intention. Should the Commission issue a complaint challenging the transaction during this period, respondents are required to postpone the proposed merger or acquisition until administrative proceedings have been concluded. Additionally, the order limits sales between the two companies until July 31, 1981.

Appearances

For the Commission: *Peter E. Greene.*

For the respondents: *Alan I. Becker, Kirkland & Ellis,* Chicago, Ill. for Harnischfeger Corporation and *William O. Fiffield, Sidley & Austin,* Chicago, Ill. for Northwest Engineering Company.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITION

PARAGRAPH 1. For the purpose of this complaint, the following definition shall apply: "lattice boom cranes" means cranes mounted either on crawlers or rubber tired vehicles, powered by one or more

engines, the boom and hoist functions of which are carried out by wire rope, and which are generally operated by a conventional gear train controlled by brakes and clutches.

II. Harnischfeger Corporation

PAR. 2. Harnischfeger Corporation (P&H) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 13400 Bishops Lane, Brookfield, Wisconsin.

PAR. 3. P&H manufactures and sells lattice boom cranes throughout the United States. Annual sales thereof in 1977 exceeded $25.8 million.

PAR. 4. In its fiscal year ended October 31, 1977, P&H had total net sales of approximately $466,098,000 and net income of approximately $21,850,000.

III. Northwest Engineering Company

PAR. 5. Northwest Engineering Company (NW) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 201 West Walnut St., Green Bay, Wisconsin.

PAR. 6. NW manufactures and sells lattice boom cranes throughout the United States. Annual sales thereof in 1977 exceeded $21.6 million.

PAR. 7. In the twelve-month period ended October 31, 1977, NW had total net sales of approximately $43,314,000 and net income of approximately $1,091,000.

IV. Jurisdiction

PAR. 8. At all times relevant herein P&H and NW have been engaged in the manufacture and sale of lattice boom cranes in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. The Merger Agreement

PAR. 9. On or about December 22, 1977, P&H and NW entered into a merger agreement which provides, *inter alia,* for the merger of a subsidiary of P&H into NW. Upon consummation of the merger NW will become a wholly-owned subsidiary of P&H.

VI. Trade and Commerce

PAR. 10. The relevant line of commerce is the manufacture and sale of lattice boom cranes and submarkets thereof.

PAR. 11. A relevant section of the country or geographic market is the entire United States.

PAR. 12. The manufacture and sale of lattice boom cranes is highly concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 70 percent.

PAR. 13. Barriers to entry into the manufacture and sale of lattice boom cranes are substantial.

VII. Actual Competition

PAR. 14. P&H and NW are and have been for many years actual competitors of each other in the manufacture and sale of lattice boom cranes and submarkets thereof and actual competitors of others engaged in the manufacture and sale of lattice boom cranes and submarkets thereof throughout the United States.

PAR. 15. In 1977, P&H accounted for approximately 12.5 percent of United States production of lattice boom cranes and Northwest accounted for approximately 6.4 percent thereof. P&H accounted for approximately 8.4 percent of 1977 United States sales of lattice boom cranes, and Northwest accounted for approximately 7.0 percent thereof.

VIII. Effects; Violations Charged

PAR. 16. The effects of the proposed acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between P&H and NW in the manufacture and sale of lattice boom cranes and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the manufacture and sale of lattice boom cranes and submarkets thereof may be lessened;

(c) NW will be eliminated as an actual substantial independent competitor in the manufacture and sale of lattice boom cranes and submarkets thereof;

(d) concentration in the manufacture and sale of lattice boom

cranes will be increased and the possibilities for eventual deconcentration may be diminished; and

(e) mergers or acquisitions between other lattice boom crane manufacturers may be fostered, thus causing a further substantial lessening of competition and tendency toward monopoly in the manufacture and sale of lattice boom cranes.

Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Harnischfeger Corporation is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 13400 Bishops Lane, Brookfield, Wisconsin.

2. Respondent Northwest Engineering Company is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Walnut St., Green Bay, Wisconsin.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITION

For purposes of this order the following definition shall apply:

"Lattice-boom cranes" means cranes mounted either on crawlers or rubbertired vehicles powered by one or more engines, the boom hoist of which are carried out by wire rope, and which are generally operated by a conventional gear train controlled by brakes and clutches.

I.

It is ordered, That Harnischfeger Corporation (Harnischfeger) and Northwest Engineering Company (Northwest) do forthwith provide evidence that all agreements which provided for the merger of a newly formed subsidiary of Harnischfeger into Northwest and which would result in Northwest becoming a wholly-owned subsidiary of Harnischfeger have been terminated. Harnischfeger and Northwest each shall forthwith return any confidential documents provided by the other in connection with the merger agreement, and nothing herein contained shall relieve any party from any obligations of confidentiality imposed by agreement between them or by operation of law.

II.

It is further ordered, That until July 31, 1981 neither Harnischfeger nor Northwest shall acquire either directly or indirectly any part of the lattice boom crane business of each other, whether represented by securities or assets, until sixty (60) days following receipt by the Director of the Bureau of Competition of the Federal Trade Commission of written notice of the proposed acquisition or merger, which notice shall specifically refer to this order. If within sixty (60) days of receipt by the Director of said notice the Commission issues an administrative complaint challenging the proposed acquisition or merger, such proposed acquisition or merger shall not be consummated, nor shall any steps be taken to effectuate such proposed acquisition or merger until the administrative complaint issued by the Commission is dismissed by the Commission, until a final order as defined in 15 U.S.C. 21 and 45 is entered, or until a consent order is entered and served upon the respondents in that administrative proceeding. If within the aforesaid sixty (60) days the Bureau of Competition receives any written position papers from either

Harnischfeger or Northwest and the Bureau recommends issuance of a complaint, the Bureau shall promptly forward to the Commission such papers together with the written notice submitted to the Bureau Director. In the event that within sixty (60) days of the Director's receipt of said notice the Commission issues an administrative complaint challenging the proposed acquisition or merger, the Bureau of Competition shall exert its best efforts to complete the administrative proceeding in an expedited manner.

The execution of a contract between Harnischfeger and an independent distributor or dealer who also is, or formerly was, a distributor or dealer for Northwest shall not be deemed the acquisition of any part of the lattice boom crane business of Northwest under this paragraph, and the execution of a contract between Northwest and an independent distributor or dealer who also is, or formerly was, a distributor or dealer for Harnischfeger shall not be deemed the acquisition of any part of the lattice boom crane business of Harnischfeger under this paragraph, except that Harnischfeger and Northwest shall not jointly execute a contract between them and an independent distributor or dealer.

III.

It is further ordered, That until July 31, 1981 the total sales for each quarterly period or portion thereof based on a calendar year, between Harnischfeger and Northwest shall not account, either directly or indirectly, for an amount equivalent to 4 percent or more of Northwest's total sales for the previous fiscal year. Sales as used herein means the dollar value of total product and parts shipments and shall be accounted for as of the date of shipment.

IV.

It is further ordered, That Harnischfeger and Northwest each shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation of dissolution of subsidiaries or any other change which may affect compliance obligations arising out of this order.

V.

It is further ordered, That Harnischfeger and Northwest each shall within sixty (60) days after service upon it of this order file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Thereafter, on or

before August 15, 1979 and annually thereafter until August 15, 1981, each shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order for the immediately preceeding consecutive twelve month period ending on July 31st. The fact that any activity is not prohibited by this order shall not bar a challenge to it by the United States Government, any agency thereof or any person.

277-685 O—79——61

IN THE MATTER OF

NELSON BROTHERS FURNITURE CORP.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2941. Complaint, Dec. 8, 1978 — Decision, Dec. 8, 1978

This consent order, among other things, requires a Chicago, Ill. retailer of household goods to cease misrepresenting or failing to make relevant timely disclosures regarding the cost, savings, condition and availability of advertised merchandise; employing bait and switch tactics, or any other unfair or deceptive sales technique in the advertising and sale of its products. Additionally, the order provides customers with the right to arbitration for unresolved disputes and requires the firm to maintain prescribed business records for a period of three years.

Appearances

For the Commission: *Nathan P. Owen.*
For the respondent: *Sidley & Austin,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Nelson Brothers Furniture Corp., hereinafter referred to as respondent, has violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Nelson Brothers Furniture Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 2750 West Grand Ave., Chicago, Illinois.

PAR. 2. Respondent is engaged in the operation of retail stores in the States of Illinois and Wisconsin. Its volume of business is substantial. In the operation of its retail stores respondent maintains showrooms in which it offers and sells to its customers an extensive line of home furnishings, bedding, carpeting, televisions, appliances and other merchandise. Much of the said merchandise is purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, respondent causes, directly or indirectly, the aforesaid merchandise to be

shipped and distributed from manufacturing plants, warehouses, or from other sources of supply to its warehouses, distribution centers, or retail stores located in various states other than the state of origination, distribution or storage of said merchandise. Respondent maintains a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid merchandise in or affecting Commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, as aforesaid, respondent disseminated and caused to be disseminated certain advertisements concerning the aforesaid merchandise by various means, including but not limited to advertisements in newspapers of general and interstate circulation, in radio and television broadcasts of interstate circulation and in other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said merchandise from respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list, describe or depicted various items of said merchandise and also contained statements and representations concerning the price or terms at which said merchandise was offered for sale and sold to the public. Many of said advertisements contain further direct and express statements and representations concerning the time periods during which the offers were in effect.

PAR. 5. In the course and conduct of its business, and for the purpose of inducing the sale of its merchandise, respondent has made numerous statements and representations in newspaper advertisements, radio and television commercials and in other advertising media and in oral statements by salesmen to prospective customers.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

1. Warehouse Clearance Sale. . .Every price has been slashed to ribbons to bring you the savings of a life time. . . Starting today. . .3 Big Days of Super Savings "Nelson Warehouse Priced"

2. Out of Our Warehouse Must sell 3 rooms of furniture! 16 pc. living rm., 11 pc bdrm., complete dinette. $333. Terms Nelsons' 2750 W. Grand (Classified Ad)

3. Hurry. . .Time is Running Out. Get This Beautiful 10-cup 'Toastmaster' Stainless Steel Automatic Coffee Maker Absolutely Free! Its yours Free with purchase of a Speed Queen Automatic Washer or Dryer with stainless steel drum. . .

4. Warehouse Sale

* * * * * * *

Look! Here are. . . Down-To-Earth Price Reductions! Here's Your Big Chance To Save!

* * * * * * *

It's the Buying Opportunity of a Lifetime

5. Grouped to Save you Money and Beautify Your Home. Get Your Share of Savings on this Special 3-room Offer! Everything is complete. . . "From the Rugs on the Floor. . .To the Pictures on the Wall" $688

6. Count the dollars you save on furniture by the roomful at Nelson Brothers' low warehouse prices Glamorous living roomfuls of furniture. . .complete from rugs on the floor to pictures on the wall. . .You'd expect the price tag to be $500.00 . . . low warehouse priced from $288.00.

Plenty of Credit for You. . .Free Delivery Too. (During the above television audio, slides were shown of 4 living room suites with the words "$288.00" superimposed on the slides when mentioned in the audio.)

Nelson Brothers loves me, and they'll love you too! (Jingle; sung.)

PAR. 6. By and through the use of the above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in conjunction with the oral statements and representations of respondent's salesmen to customers and prospective customers, respondent has represented that:

1. Respondent's merchandise was offered for sale at special or reduced prices, and that savings were afforded to purchasers from respondent's regular selling prices.

2. Purchasers of respondent's advertised merchandise would realize significant savings from the price at which said merchandise was offered for sale or sold at retail by respondent in its recent regular course of business.

3. Merchandise advertised for sale by respondent in room groupings for one stated price afforded special or significant savings which were not available if all of the products depicted in said room groupings were purchased as a group at times other than those during which the group was advertised as being "on sale."

4. Respondent's advertised offer was made for a limited time only.

5. The prices at which respondent offered merchandise for sale in their advertisements were the prices at which said merchandise was sold to all customers who purchased such merchandise during the effective duration of said advertised offer.

6. At least one, or more, of the room "groupings" pictured in

respondent's television advertisements were available as shown for the price or prices set forth in said advertisements.

7. Respondent was making a bona fide offer to sell the advertised merchandise at the prices and on the terms and conditions stated in the advertisements.

8. The prices shown on the hang tags attached to merchandise in respondent's showrooms and labeled as "Nelsons' Warehouse Price" were the amounts at which said merchandise was sold or offered for sale by respondent for a reasonable substantial period of time in the recent, regular course of its business.

9. All purchasers of merchandise would receive free gifts or bonuses with the purchase of said merchandise when such gifts or bonuses were mentioned in the advertised offer.

10. The prices quoted in respondent's advertisements were the full amount which a customer would have to pay to have the merchandise in working order, as pictured in the advertisment, in his home.

PAR. 7. In truth and in fact:

1. Respondent's products were not offered for sale at special or reduced prices and savings were not afforded purchasers by way of reductions from respondent's regular selling prices. The prices stated in respondent's advertisments were available to purchasers at other times, both before and after the effective period of said advertisements.

2. Purchasers of respondent's advertised merchandise did not realize significant savings from the prices at which said merchandise had been offered for sale or sold at retail in its recent, regular course of business. The prices represented in said advertisements did not constitute reductions from those at which the same merchandise was regularly offered for sale or was available for purchase from respondent in its regular course of business.

3. Merchandise advertised for sale by respondent in room "groupings" for one stated price did not afford purchasers special or significant savings from the cost of such merchandise if purchased as a group as depicted in said advertisements at times other than those during which the group was advertised as "on sale."

4. Respondent's advertised prices were often not available for a limited time only but were available to purchasers before during or after the limited time described in the advertised offer.

5. The prices at which respondent offered merchandise for sale in their advertisments were often not the prices at which said merchandise was sold to all purchasers thereof during the effective

duration of said advertised offer. The advertised prices were only available to purchasers of the advertised merchandise who specifically requested said merchandise at the advertised prices.

6. In many instances, some of the room "groupings" pictured in respondent's television advertisements were not available for purchase as shown for the price or prices set forth in said advertisements.

7. Respondent was not making a bona fide offer to sell the advertised merchandise at the prices and on the terms and conditions stated in its advertisements. Said offers were frequently made for the purpose of obtaining leads or prospects for the sale of other merchandise at higher prices.

8. The prices shown on the hang tags attached to merchandise in respondent's showrooms and labeled as "Nelsons' Warehouse Price" were not the prices at which said merchandise was sold to the public for a reasonably substantial period of time in the recent, regular course of respondents' business.

9. Purchasers of merchandise did not always receive advertised free gifts or bonuses. The gifts or bonuses mentioned in respondent's advertisements were only given to those purchasers who specifically requested them when purchasing said advertised merchandise.

10. The prices quoted in respondent's advertisements were not all costs a customer was required to pay to have that item in working condition, as pictured in the advertisement, in his home. In addition to the prices quoted, certain other charges were frequently made: such as; installation, set up or assembly, service and warranty charges.

PAR. 8. In the further course and conduct of its business respondent has caused to be advertised merchandise without disclosing in said advertising that such merchandise was used or not new or damaged or defective or was otherwise classified as "distressed." Furthermore, respondent has sold, or offered for sale or has delivered merchandise without disclosing, orally or in writing, at the time of sale that such merchandise was used or not new or damaged or defective or was otherwise classified as "distressed."

Therefore, respondent's failure to disclose in advertising to prospective customers and failure to inform prospective customers or purchasers, orally or in writing, at the time of sale, that merchandise to be sold or offered for sale was used or not new or damaged or defective or was otherwise classified as "distressed" in furtherance of their deceptive advertising and sales practices, was an unfair or

deceptive practice, in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 9. In the further course and conduct of its business, respondent has made in its advertisements, offers of specific items of merchandise for sale at certain prices during certain times at certain of their stores. During the effective period of said advertisements, respondent has failed to have:

1. Each advertised item clearly and conspicuously available for sale to the public in each and every retail showroom at which the item was advertised as available;
2. At each location where an advertised item was displayed for sale, a sign or other marking clearly disclosing the item which was "as advertised" or "on sale";
3. Each advertised item individually and clearly marked with a price which was equal to or less than the advertised price;
4. Each advertised "room grouping" clearly and conspicuously marked with a "group" price which was at or below the advertised price; and
5. Each item included in the advertised group clearly and conspicuously listed and disclosed separately from items not included within the group.

Respondent's failure to adequately identify items in its showrooms or to have advertised items available in its showrooms, encouraged its salespersons to engage in bait and switch selling practices and other deceptive, false or misleading sales tactics.

PAR. 10. The use by respondent of the aforesaid unfair, false, misleading or deceptive statements, representations, advertisements, acts or practices, has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements, representations and advertisements were true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 11. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in or affecting commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondent.

PAR. 12. The aforesaid acts and practices of the respondent as herein alleged, were all to the prejudice and injury of the public and the respondent's competitors and constituted unfair methods of

competition in commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered comments filed pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Proposed Respondent Nelson Brothers Furniture Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 2750 West Grand Ave., Chicago, Illinois.

B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

A. It is ordered that respondent, Nelson Brothers Furniture Corp., a corporation, its successors and assigns, directly or through

its officers, agents, representatives, sales persons and employees, or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and distribution of home furnishings, bedding, carpeting, televisions, appliances, or any other merchandise, to the public, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Advertising or offering for sale any merchandise at a special or reduced price, unless such price constitutes a significant reduction from the price at which such merchandise has been sold or openly offered for sale by respondent for a reasonably substantial period of time in the recent, regular course of respondent's business.

2. Advertising or offering for sale any group, set, suite, or similar combination of merchandise at a group "sale" price, or price described by words of similar meaning or import, unless the "sale" price at which the merchandise is offered constitutes a bona fide and reasonably significant reduction from the most recent price at which the group was sold or openly offered for sale for a reasonably substantial period of time in the recent, regular course of respondent's business.

3. Advertising or offering for sale any merchandise which is limited as to quantity or availability unless such limitations are clearly and conspicuously disclosed in such advertising or offering in immediate conjunction with or in close proximity to the advertised merchandise so limited and the limitations are actually enforced and adhered to.

4. Failing to sell or to offer for sale advertised merchandise at the terms and conditions and at or below the price disclosed in the advertisement for the said merchandise.

Provided, however, that it shall constitute a defense to a charge under Paragraph 3 or 4 of this order if respondent maintains records sufficient to show that: a) the advertised merchandise was ordered in normally adequate time for delivery, b) the advertised merchandise was ordered in quantities sufficient to meet reasonably anticipated demands and c) the advertised merchandise was not delivered to the customer due to circumstances beyond the respondent's control.

5. Using pictorial representations of two or more items of merchandise in conjunction with a stated price or range of prices when all of the merchandise in the pictorial representations is not being offered at the stated price or range of prices, unless a clear and conspicuous disclosure is made in immediate conjunction with or inclose proximity to the stated price or range of prices identifying

merchandise which is included or is not included in the stated price or range of prices.

6. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise.

7. Advertising or offering for sale, orally or in writing, any merchandise or services when the purpose of the advertising or offer is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

8. Discouraging or disparaging the purchase of any merchandise or services which are advertised or offered for sale.

9. Representing that any price is respondent's regular, usual, former, customary or original price, unless such price is the price at which such merchandise or service has been sold or openly offered for sale by respondent for a reasonably substantial period of time in the recent and regular course of respondent's business, and does not exist for the purpose of establishing a fictitious price upon which a deceptive comparison, or "free" or similar offer might be based.

10. Using the words "free" or "gift" or any other word or words of similar import or meaning in connection with the sale, offering for sale or distribution of respondent's merchandise or services in advertisements or other offers to the public, as descriptive of an article of merchandise or service:

(a) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" or "gift" article of merchandise or service offered are not clearly and conspicuously disclosed in immediate conjunction with or in close proximity to the "free" or "gift" offer.

(b) When, with respect to any article of merchandise or service required to be purchased in order to obtain the "free" or "gift" article or service, the offeror either (i) increases the ordinary and usual price of such merchandise or service or (ii) reduces the quality or (iii) reduces the quantity or size thereof.

11. Failing to give "free" or "gift" merchandise to all persons who complied with the terms and conditions of the "free" or "gift" offer.

12. Using pictorial representations in advertising, unless such pictorial representations describe or show the advertised merchandise with sufficient clarity so that the advertised merchandise can be

readily identifiable by potential customers when visiting respondent's showrooms.

13. Failing to disclose in advertising, in a clear and conspicuous manner, in immediate conjunction with or in close proximity to the advertised merchandise, that such merchandise is used or not new or damaged or defective or is otherwise classified as "distressed" if such is the case.

14. Failing to inform all customers at the time of sale and to provide in writing on the face of all order forms, in close proximity to the description and price of the merchandise being sold that such merchandise is used or not new or damaged or defective or is otherwise classified as "distressed" if such is the case.

15. Failing to inform all customers at the time of sale and to provide in writing on the face of all order forms, in close proximity to the description and price of the merchandise being sold, that such merchandise will be sold "as is," or "as shown" with defects, irregularities or damage if such is the case.

16. Failing to have each customer who has agreed to purchase merchandise on an "as is" or "as shown" basis, sign at the time of sale, the following statement stamped on the face of the order form in close proximity to a description of the merchandise and written in the same language as that used in the sales presentation, with text of not less than ten-point boldface type:

THE ABOVE DESCRIBED MERCHANDISE IS SOLD "AS IS" OR "AS SHOWN" WITH DEFECTS, IRREGULARITIES OR DAMAGE.

_____

CUSTOMER SIGNATURE

17. Failing to disclose in its advertising and at the time of sale that in addition to the price quoted in respondent's advertising, certain other charges, as applicable, are made for installation, assembly, delivery or for other services performed in connection with the sale or delivery of merchandise.

18. Failing to maintain and produce for inspection and copying for a period of three years from the date of service of this order, or the date of the event, whichever is later, adequate records to document:

a. Respondent's total costs for each advertisement run by them during the three years; and

b. The volume of sales made of the advertised product or service at the advertised price; and

c. The factual basis for any representations or statements as to

special or reduced prices, as to usual or customary retail prices, as to savings afforded purchasers, and as to similar representations of the type described in Paragraphs A.1. and A.2. of this order; and

d. The number of advertised items in stock as of the first day the advertisement is run, the last day the advertisement is run, and six weeks to the day after the termination of the publication of the advertisement; and

e. Copies of all advertisements, including newspapers, radio and television advertisements, direct mail and in-store solicitation literature and any other promotional material distributed to the public; and

f. The names and addresses of all customers who purchased "as is" or "as shown" merchandise.

B. *It is further ordered,* That respondent cease and desist from advertising or offering for sale any merchandise at any stated price, unless during the effective period of an advertised offer:

1. Each advertised item is clearly and conspicuously available for sale to the public at or below the advertised price in each store covered by the advertisement;

2. At each location within each store where an advertised item is displayed there is a sign or other conspicuous marking attached to or in close proximity to the item clearly disclosing that the item is "as advertised" or "on sale" or words of similar import and meaning;

3. Each advertised item is individually and clearly marked with the price which is at or below the advertised price; and

4. Each advertised "room grouping" is clearly and conspicuously marked by a "group" price which is at or below the advertised price; and

5. Each item included in the advertised group is clearly and conspicuously listed and disclosed separately from items not included within the group.

C. *It is further ordered,* That respondent shall deliver a copy of this order to cease and desist to each of its operating divisions and to each of its present and future officers, directors, and personnel engaged in any way in the offering for sale, sale or distribution of any product, in any aspect of preparation, creation or placing of any and all advertisements, and in any processing, counselling, consummation or enforcement of any extension of consumer credit, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

D. *It is further ordered,* That respondent shall provide each

present and future advertising agency utilized by respondents with a copy of this order to cease and desist.

E. *It is further ordered,* That in addition to other rights given to a customer pursuant to this order, if the respondent and a customer are unable to agree upon a settlement of any controversy which is concerned with or relates to the quality, quantity, condition, repair or replacement of furniture, appliances, or other merchandise, or the failure to replace or repair damaged or defective merchandise, or to make cancellations with refunds with respect thereto, then, at the option of the customer, such customer shall have the right to submit the issues to an impartial arbitration procedure entailing no mandatory administrative cost or filing fee to the customer, which shall be conducted in accordance with the arbitration rules and procedures of the Arbitration Program of the Better Business Bureau of Metropolitan Chicago, Inc., 35 E. Wacker Drive, Chicago, IL 60601. Customers of respondent's Wisconsin stores who elect to seek arbitration pursuant to this paragraph shall be entitled to a proceeding conducted in accordance with the arbitration rules and procedures of the Council of Better Business Bureaus, Inc., 1150 17th St., N.W., Washington, D.C. 20036 conducted by the Better Business Bureau of Greater Milwaukee, 174 W. Wisconsin Ave., Milwaukee, Wisconsin 53203.

F. *It is further ordered,* That respondent comply with and abide by any award or decision rendered pursuant to the arbitration provision hereof.

Furthermore, respondent shall not be entitled to prevent arbitration pursuant to any provision of this order by reason of having obtained a default judgment against any customer in an action for money allegedly due the respondents or their assignees.

G. *It is further ordered,* That respondent shall provide notification to customers of their right to submit such controversy to arbitration by prominently displaying the following notice in all its stores at the location where customers usually execute consumer credit instruments or other legally binding documents, such notice being written in the same language as that used in the sales presentation with text of not less than ten-point boldface type:

NOTICE TO ALL CUSTOMERS

Any controversy which is concerned with or relates to the quality, quantity, condition, repair or replacement of furniture, appliances or other merchandise, or the failure to replace or repair damaged or defective merchandise, or to make cancellations with refunds with respect thereto shall be settled, at the option of the customer, and at no cost to the customer, by arbitration.

(Illinois stores conclude:)

Such arbitration shall be conducted in accordance with the rules and procedures of the Arbitration Program of the Better Business Bureau of Metropolitan Chicago, Inc. Consumers seeking arbitration should contact the Better Business Bureau of Metropolitan Chicago, Inc., whose offices are located at 35 E. Wacker Drive, Chicago, Illinois 60601, telephone (312) 346-3313.

Under Illinois state law, arbitration, if undertaken is legally binding and final!

(Wisconsin stores conclude:)

Such arbitration shall be conducted in accordance with the rules and procedures of the Council of Better Business Bureaus, Inc., 1150 17th Street N.W., Washington, D.C. 20036 conducted by the Better Business Bureau of Greater Milwaukee. Consumers seeking arbitration should contact the Better Business Bureau of Greater Milwaukee, Wisconsin 53203, telephone (414) 273-4300.

Under Wisconsin state law, arbitration, if undertaken is legally binding and final!

Respondent is authorized and directed to change the instructions, contained in the Notice set forth above as to how to secure arbitration, if circumstances require.

H. *It is further ordered,* That respondent shall maintain full and complete records and copies of all complaint correspondence received from customers, and any internal memoranda written in connection therewith, and full and complete records of all oral complaints and requests for service or repair, for a period of three (3) years from the date of receipt thereof.

I. *It is further ordered,* That nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondent from complying with agreements, orders or directives of any kind obtained by any other municipal, state or federal agency, except to the extent that they are inconsistent with the terms and conditions of this order, or act as a defense to actions instituted by municipal, state or federal agencies.

Nothing in this order shall be construed to imply that any past or future conduct of respondent complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

J. *It is further ordered,* That the respondent notify the Commission at least 30 days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation or corporate structure which may affect compliance obligations arising out of this order.

K. *It is further ordered,* That respondent herein shall, within sixty (60) days after service upon it of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

LOCKHEED CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2942. Complaint, Dec. 21, 1978 — Decision, Dec. 21, 1978

This consent order, among other things, requires a Burbank, Calif. aircraft manufacturer and its subsidiaries to cease offering or making payments to influential foreign entities for the purpose of preventing competition in the sale of their aircraft abroad; and to keep adequate documentation for all payments, brokerage fees, commissions, or political campaign contributions paid to any one foreign party which total annually in excess of $100,000. Respondents are additionally required to report to the Commission, within ten days, any corporate policy change which relates to foreign sales activities.

Appearances

For the Commission: *Daniel A. Laufer* and *Jaime Taronji, Jr.*
For the respondent: *Roger Clark, Rogers & Wells,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Lockheed Corporation, a corporation under the jurisdiction of the Commission, has violated Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

PARAGRAPH 1. Lockheed Corporation (hereinafter "Lockheed") is a California corporation with its principal office and place of business located at 2555 Hollywood Way, Burbank, California.

PAR. 2. At all times relevant herein, Lockheed was engaged in the purchase or sale of products and services in interstate and foreign commerce and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

PAR. 3. Between 1970 and 1975, in connection with certain export sales of jet aircraft by Lockheed in competition with other domestic aircraft manufacturers, Lockheed made payments to or intended for foreign government officials or officers or employees of foreign commercial customers who were in a position to make or influence the decision whether or not to purchase the aircraft offered for sale

by Lockheed. Such payments, in some instances, effectively excluded other domestic aircraft manufacturers from selling their aircraft to the governments and airlines whose officials, officers, and employees had received the payments.

PAR. 4. The above-described acts, practices and methods of competition by Lockheed committed in a successful attempt to procure aircraft sales for itself and deny such sales to domestic competitors, constitute unfair acts or practices and unfair methods of competition in violation of Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act and the Robinson-Patman Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following findings and enters the following order:

1. Respondent Lockheed Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business at 2555 Hollywood Way, Burbank, California.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

It is hereby ordered, That respondent Lockheed Corporation, and its officers, agents, employees, representatives, successors and assigns, and its subsidiaries, through any corporate or other device, in its transactions in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist, in connection with its foreign sales activity, from offering to make or making payments to officers, employees, agents or representatives of commercial customers or foreign governments in any form whatsoever, directly or indirectly, where the purpose of such payments is to influence the recipient of the payment or the customer to favor respondent at the expense of one or more domestic competitors of respondent or to prevent domestic competitors from bidding, selling, or otherwise doing business in competition with respondent in the sale of aircraft, aircraft parts or related services to foreign governments or business entities. For purposes of this order, "payments" shall not include normal business expenditures for entertainment, travel or small gifts (the cost of which does not exceed $1,000 per gift) for promotion of respondent's products or services, or payments permitted under Sections 103(b) or 104(d)(2) of the Foreign Corrupt Practices Act of 1977.

It is further ordered, That respondent and its subsidiaries shall maintain adequate documentation, with respect to all payments referred to in the previous paragraph; and with respect to all brokerage fees, commissions or political campaign contributions which total in excess of $100,000 in any calendar year, paid to any one foreign public official, person, firm, corporation, or other foreign entity, and the Federal Trade Commission shall have continuing access to such documentation. Such documentation shall include, but not be limited to, all internal memoranda, all financial documents, and all correspondence with third persons, firms, corporations, or other entities regarding such payments, brokerage fees, commissions, or political campaign contributions and all correspondence with international marketing consultants regarding breaches of their consulting contracts, maintained in the ordinary course of business.

It is further ordered, That in the event there is to be any change of respondent's policy respecting payments by respondent in connection with its foreign sales activities, respondent will file with the Federal Trade Commission, within ten (10) days of the date when

such change in policy is scheduled to become effective, a report detailing the change in such policy proposed to be made.

It is further ordered, That any violation of this order shall be considered a continuing violation from the date any offer of payment or payment is made, whichever occurs first, until the date any contract procured by such offer or payment, whether or not such contract is altered, amended, or modified, is fulfilled or terminated, and each day of continuation shall be treated as a separate violation in accordance with Section 5(m)(1)(c) of the Federal Trade Commission Act. This continuing violation provision shall apply only to "payments" proscribed by this order and shall not apply to "offers" that do not result in a proscribed payment.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or joint ventures.

It is further ordered, That respondent shall forthwith distribute a copy of the order to each of its operating divisions and subsidiaries.

It is further ordered, That respondent shall, within sixty (60) days of service of the order file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

THE BOEING COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2943. Complaint, Dec. 21, 1978 — Decision, Dec. 21, 1978

This consent order, among other things, requires a Seattle, Wash. aircraft manufacturer and its subsidiaries to cease offering or making payments to influential foreign entities for the purpose of preventing competition in the sale of their aircraft abroad; and to keep adequate documentation for all payments, brokerage fees, commissions, or political campaign contributions paid to any one foreign party which total annually in excess of $100,000. Respondents are additionally required to report to the Commission, within ten days, any corporate policy change which relates to foreign sales activities.

Appearances

For the Commission: *Daniel A. Laufer* and *Jaime Taronji, Jr.*

For the respondent: *Harold Olsen, Perkins, Core, Stone, Olsen & Williams,* Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Boeing Company, a corporation under the jurisdiction of the Commission, has violated Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

PARAGRAPH 1. The Boeing Company (hereinafter "Boeing") is a Delaware corporation with its principal office and place of business located at 7755 East Marginal Way South, Seattle, Washington.

PAR. 2. At all times relevant herein, Boeing was engaged in the purchase or sale of products and services in interstate and foreign commerce and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

PAR. 3. Between 1970 and 1975, in connection with certain export sales of jet aircraft by Boeing in competition with other domestic aircraft manufacturers, Boeing made payments to or intended for foreign government officials or officers or employees of foreign commercial customers who were in a position to make or influence

the decision whether or not to purchase the aircraft offered for sale by Boeing. Such payments, in some instances, effectively excluded other domestic aircraft manufacturers from selling their aircraft to the governments and airlines whose officials, officers, and employees had received the payments.

PAR. 4. The above-described acts, practices and methods of competition by Boeing committed in a successful attempt to procure aircraft sales for itself and deny such sales to domestic competitors, constitute unfair acts or practices and unfair methods of competition in violation of Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act and the Robinson-Patman Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following findings and enters the following order:

1. Respondent The Boeing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 7755 East Marginal Way South, Seattle, Washington.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

It is hereby ordered, That respondent The Boeing Company, and its officers, agents, employees, representatives, successors and assigns, and its subsidiaries, through any corporate or other device, in its transactions in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist, in connection with its foreign sales activity, from offering to make or making payments to officers, employees, agents or representatives of commercial customers or foreign governments in any form whatsoever, directly or indirectly, where the purpose of such payments is to influence the recipient of the payment or the customer to favor respondent at the expense of one or more domestic competitors of respondent or to prevent domestic competitors from bidding, selling, or otherwise doing business in competition with respondent in the sale of aircraft, aircraft parts or related services to foreign governments or business entities. For purposes of this order, "payments" shall not include normal business expenditures for entertainment, travel or small gifts (the cost of which does not exceed $1,000 per gift) for promotion of respondent's products or services, or payments permitted under Sections 103(b) or 104(d)(2) of the Foreign Corrupt Practices Act of 1977.

It is further ordered, That respondent and its subsidiaries shall maintain adequate documentation, with respect to all payments referred to in the previous paragraph; and with respect to all brokerage fees, commissions or political campaign contributions which total in excess of $100,000 in any calendar year, paid to any one foreign public official, person, firm, corporation, or other foreign entity, and the Federal Trade Commission shall have continuing access to such documentation. Such documentation shall include, but not be limited to, all internal memoranda, all financial documents, and all correspondence with third persons, firms, corporations, or other entities regarding such payments, brokerage fees, commissions, or political campaign contributions and all correspondence with international marketing consultants regarding breaches of their consulting contracts, maintained in the ordinary course of business.

It is further ordered, That in the event there is to be any change of respondent's policy respecting payments by respondent in connection with its foreign sales activities, respondent will file with the

Federal Trade Commission, within ten (10) days of the date when such change in policy is scheduled to become effective, a report detailing the change in such policy proposed to be made.

It is further ordered, That any violation of this order shall be considered a continuing violation from the date any offer of payment or payment is made, whichever occurs first, until the date any contract procured by such offer or payment, whether or not such contract is altered, amended, or modified, is fulfilled or terminated, and each day of continuation shall be treated as a separate violation in accordance with Section 5(m)(l)(c) of the Federal Trade Commission Act. This continuing violation provision shall apply only to "payments" proscribed by this order and shall not apply to "offers" that do not result in a proscribed payment.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or joint ventures.

It is further ordered, That respondent shall forthwith distribute a copy of the order to each of its operating divisions and subsidiaries.

It is further ordered, That respondent shall, within sixty (60) days of service of the order file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

McDONNELL DOUGLAS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2944. Complaint, Dec. 21, 1978 — Decision, Dec. 21, 1978

This consent order, among other things, requires a St. Louis County, Mo. aircraft manufacturer and its subsidiaries to cease offering or making payments to influential foreign entities for the purpose of preventing competition in the sale of their aircraft abroad; and to keep adequate documentation for all payments, brokerage fees, commissions, or political campaign contributions paid to any one foreign party which total annually in excess of $100,000. Respondents are additionally required to report to the Commission, within ten days, any corporate policy change which relates to foreign sales activities.

Appearances

For the Commission: *Daniel A. Laufer* and *Jaime Taronji, Jr.*

For the respondent: *Alfred W. Cortese, Jr., Clifford, Glass, McIlwain & Finney,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that McDonnell Douglas Corporation, a corporation under the jurisdiction of the Commission, has violated Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

PARAGRAPH 1. McDonnell Douglas Corporation (hereinafter "MDC") is a Maryland corporation with its principal office and place of business located at Airport and Brown Roads, St. Louis County, Missouri.

PAR. 2. At all times relevant herein, MDC was engaged in the purchase or sale of products and services in interstate and foreign commerce and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

PAR. 3. Between 1970 and 1975, in connection with certain export sales of jet aircraft by MDC in competition with other domestic aircraft manufacturers, MDC made payments to or intended for foreign government officials or officers or employees of foreign

commercial customers who were in a position to make or influence the decision whether or not to purchase the aircraft offered for sale by MDC. Such payments, in some instances, effectively excluded other domestic aircraft manufacturers from selling their aircraft to the governments and airlines whose officials, officers, and employees had received the payments

PAR. 4. The above-described acts, practices and methods of competition by MDC committed in a successful attempt to procure aircraft sales for itself and deny such sales to domestic competitors, constitute unfair acts or practices and unfair methods of competition in violation of Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13 (c)) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act and the Robinson-Patman Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following findings and enters the following order:

1. Respondent McDonnell Douglas Corporation is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Maryland, with its principal place of business at Airport and Brown Roads, St. Louis County, Missouri.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

It is hereby ordered, That respondent McDonnell Douglas Corporation, and its officers, agents, employees, representatives, successors and assigns, and its subsidiaries, through any corporate or other device, in its transactions in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist, in connection with its foreign sales activity, from offering to make or making payments to officers, employees, agents or representatives of commercial customers or foreign governments in any form whatsoever, directly or indirectly, where the purpose of such payments is to influence the recipient of the payment or the customer to favor respondent at the expense of one or more domestic competitors of respondent or to prevent domestic competitors from bidding, selling, or otherwise doing business in competition with respondent in the sale of aircraft, aircraft parts or related services to foreign governments or business entities. For purposes of this order, "payments" shall not include normal business expenditures for entertainment, travel or small gifts (the cost of which does not exceed $1,000 per gift) for promotion of respondent's products or services, or payments permitted under Sections 103(b) or 104(d)(2) of the Foreign Corrupt Practices Act of 1977.

It is further ordered, That respondent and its subsidiaries shall maintain adequate documentation, with respect to all payments referred to in the previous paragraph; and with respect to all brokerage fees, commissions or political campaign contributions which total in excess of $100,000 in any calendar year, paid to any one foreign public official, person, firm, corporation, or other foreign entity, and the Federal Trade Commission shall have continuing access to such documentation. Such documentation shall include, but not be limited to, all internal memoranda, all financial documents, and all correspondence with third persons, firms, corporations, or other entities regarding such payments, brokerage fees, commissions, or political campaign contributions and all correspondence with international marketing consultants regarding breaches of their consulting contracts, maintained in the ordinary course of business.

It is further ordered, That in the event there is to be any change of

respondent's policy respecting payments by respondent in connection with its foreign sales activities, respondent will file with the Federal Trade Commission, within ten (10) days of the date when such change in policy is scheduled to become effective, a report detailing the change in such policy proposed to be made.

It is further ordered, That any violation of this order shall be considered a continuing violation from the date any offer of payment or payment is made, whichever occurs first, until the date any contract procured by such offer or payment, whether or not such contract is altered, amended, or modified, is fulfilled or terminated, and each day of continuation shall be treated as a separate violation in accordance with Section 5(m)(1)(c) of the Federal Trade Commission Act. This continuing violation provision shall apply only to "payments" proscribed by this order and shall not apply to "offers" that do not result in a proscribed payment.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or joint ventures.

It is further ordered, That respondent shall forthwith distribute a copy of the order to each of its operating divisions and subsidiaries.

It is further ordered, That respondent shall, within sixty (60) days of service of the order file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

THE HERTZ CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2945. Complaint, Dec. 21, 1978 — Decision, Dec. 21, 1978

This consent order, among other things, requires a New York City car rental company to provide each charge account customer having five dollars or more as a credit balance with periodic statements reflecting that balance; notify such customers that credit balances are refundable; and automatically refund unclaimed credit balances within seven months of their occurrence. The order would additionally prohibit the company from writing off credit balances, and would require the firm to refund, upon request, any credit balance created during the past six years.

Appearances

For the Commission: *Micheal J. Vitale,* Atty. and *Irvin E. Abrams,* Investigator.

For the respondent: *Arthur K. Kahn,* Philadelphia, Pa.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Hertz Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Hertz Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 660 Madison Ave., New York, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of offering to rent and the renting of automobiles to the general public.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent rents automobiles in various States of the United States and the District of Columbia. By these and other operations respondent engages in, and at all times mentioned has been engaged in, a substantial course of business in or affecting

commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the ordinary course and conduct of its business as aforesaid, respondent permits its customers who qualify for credit to charge the rental of respondent's automobiles. Respondent bills certain of its rental customers by having the rental station at which the customer rents the automobile invoice the customer following the completion of the rental. These customers, referred to by respondent as "direct billing customers," receive no other bill. Certain other customers of respondent, referred to by respondent as "central billing customers," are billed by respondent from a central office through the use of periodic billing statements. On occasion, direct billing and central billing customers make overpayments or duplicate payments. Consequently, a customer occasionally has a "credit balance" (an amount of money owed to the customer by respondent). This credit balance is the result of a previously described overpayment or duplicate payment by the customer.

PAR. 5. Prior to May of 1976, respondent had no system for informing direct billing customers that they had a credit balance and that they were entitled to request and receive a cash refund of this balance. Furthermore, respondent did not refund credit balances to its direct billing customers unless it received a request for a refund, nor did it make cash refund of credit balances to its central billing customers unless it received a request for such a refund.

PAR. 6. By thus failing to notify certain of its customers whose accounts reflected credit balances that the credit balances existed, and that they had the right to request and receive cash payment of their credit balances, and by failing to refund without request such credit balances which existed for a substantial period of time, a number of respondent's customers were deprived of the use of substantial sums of money. Therefore, the acts and practices described in Paragraph Five above were unfair.

PAR. 7. The acts and practices of respondent as set forth in Paragraphs Five and Six above, were to the prejudice and injury of the public and constituted unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer

Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issued its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Hertz Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 660 Madison Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of its proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That The Hertz Corporation, a corporation, its successors and assigns and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the extension of credit incident to the business of renting of automobiles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

I.

A. Failing to mail to each customer having a credit balance in excess of five dollars ($5.00), created after the date of service of this order, a statement in each billing period following the creation of the

credit balance, clearly setting forth such credit balance, except that with respect to central billing customers, as "central billing customer" is defined in Paragraph Four of the complaint or other customers with accounts cumulatively billed on periodic statements, such statement shall be mailed whenever a credit balance in excess of one dollar ($1.00) is created; *provided, however,* that no statement need be sent once a credit balance is refunded or a fully offsetting purchase is made; and, *provided further,* that if the credit balance is created in connection with a direct billing customer, as "direct billing customer" is defined in Paragraph Four of the complaint, no statement need be sent if the balance is refunded within thirty (30) days following the time it was created.

B. Failing to notify each customer to whom respondent is required to send a statement under Paragraph I.A. of the customer's right to request and receive a refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each statement required by Paragraph I.A. and accompanied by a return envelope, if it is the customary practice of the division or unit to accompany billing statements with return envelopes. Such notice shall in all material respects be consistent with, but need not be identical to, the following:

NO PAYMENT REQUIRED

This Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by returning this statement with a request for a refund. If you do not use your account or request a refund, a check will be mailed to you within seven (7) months after you were sent the statement on which this credit was first reflected. But a credit balance of five dollars ($5.00) will not be refunded unless specifically requested.

The notice furnished in compliance with this paragraph shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the statement, or entirely on the reverse side of the statement, or entirely on one side of a separate page. In the event such notice is not on the face of the statement, then the statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see (enclosed instructions) OR (reverse side)."

C. Failing to refund to each customer with a credit balance of more than five dollars ($5.00) created after the date of service of the order the full amount of said credit balance no later than the end of the seventh (7th) consecutive month after the first statement reflecting the credit balance was sent to the customer and during which the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer; *provided, however,* that nothing contained in this

Paragraph C. shall prevent such a refund being made by giving a credit certificate or refund letter in the full amount of the credit balance which may, at the customer's option, be applied to subsequent rental charges or returned for a cash refund. Such certificate or refund letter or an accompanying notice attached to the certificate or refund letter shall clearly and conspicuously disclose that it is redeemable for cash if the customer returns the certificate or refund letter by mail with a request for a cash refund or that it may be applied to subsequent rental charges if the customer returns the certificate or refund letter in full or partial payment for such charges.

D. Writing off, deleting or transferring any credit balance of more than one dollar ($1.00) created after the date of service of this order from a customer's account before a refund has been made or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer or unless there has been compliance with Section III. of this order.

II.

It is further ordered, That respondent shall:

A. Within one hundred and eighty (180) days after service of this order, mail or deliver to each customer having a credit balance in excess of five dollars ($5.00) created during the three (3) year period immediately preceding the date of service of this order a statement clearly setting forth such credit balance; *provided, however,* that no statement need be sent if a credit balance has been refunded or a fully offsetting purchase has been made.

B. Within one hundred eighty (180) days after service of this order, notify each customer to whom respondent is required to send a statement under Paragraph II.A. of the customer's right to request and receive a refund in the amount of such credit balance, such notice to be accompanied by a clear and conspicuous disclosure on or enclosed with the statement required by Paragraph II.A. and accompanied by a return envelope, if it is the customary practice of the division or unit to accompany billing statements with return envelopes. The first such notice shall in all material respects be consistent with, but need not be identical to, the following:

NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by returning this statement with a request for a refund. If you do not use your account or request a refund, a check will be mailed to you within seven (7) months.

The disclosure furnished in compliance with this paragraph shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the reverse side of the statement, or entirely on one side of a separate page. In the event such disclosure is not on the face of the statement, then the statement shall state clearly and conspicuously on its face "Credit balance. Do not pay. For refund see (enclosed instructions) OR (reverse side.)"

C. Refund to each customer with a credit balance of more than five dollars ($5.00) created during the three (3) year period preceding the date of service of this order the full amount of said credit balance no later than seven (7) months following the date the statement provided in Paragraph B. of this Section II. is sent and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer; *provided, however,* that nothing contained in this Paragraph C. shall prevent such a refund from being made by giving a credit certificate or refund letter in the full amount of the credit balance which may, at the customer's option, be applied to subsequent rental charges or returned for a cash refund. Such certificate(s) or refund letter or any accompanying notice attached to the certificate or refund letter shall clearly and conspicuously disclose that it is redeemable for cash if the customer returns the certificate or refund letter by mail with a request for a cash refund or that it may be applied to subsequent rental charges if the customer returns the certificate or refund letter in full or partial payment for such charges.

D. Refrain from writing off or deleting or transferring any credit balance of more than five dollars ($5.00) created during the three (3) year period immediately preceding the date of service of this order from a customer's account before a refund has been made or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer or unless there has been compliance with Section III. of this order.

III.

It is further ordered, That:

A. Each refund required or permitted to be made by this order shall be given to the customer by mailing a check payable to the order of the customer or mailing a credit certificate or a refund letter which clearly states that it may be returned for a cash refund or returned in full or partial payment of subsequent rental charges. Each statement, notice or refund sent pursuant to Paragraph I.A.,

I.B., or I.C. of this order shall be mailed to the customer at the last known billing address of the customer and each such statement, notice or refund sent pursuant to Paragraph I.A., I.B., I.C. of this order shall have the notation "Address Correction Requested" appropriately placed on the envelope. In the event that any statement, notice or refund sent pursuant to this order reflecting a credit in the amount of fifteen dollars ($15.00) or more is returned to respondent by reason of the fact that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall then attempt to obtain from a credit bureau the most current address available for the customer by means of an infile report or other report on information then existing in the credit bureau's file. If a new address is obtained, respondent shall remail the check, statement, notice, refund letter or credit certificate to the customer at such address, except that in the case of credit balances created after the date of service of this order, respondent may, at its option, deduct the cost of obtaining such information from the credit bureau from the amount owing to the customer.

With respect to all customers whose credit balances were created during the three (3) year period immediately preceding the date of service of this order and who have not been located by the preceding method, respondent shall have no further obligation under this order except as stated below. For all customers whose credit balances are created after service of this order and who have not been located by the preceding method, respondent shall retain on the account the amount of the credit balance for one year from the date on which the statement, notice or refund was mailed, and respondent shall be relieved of any further obligation to send any additional statement, notice or refund with respect to the credit balance in question.

Provided, however, that, in the event any customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph III.B.

In the event that any statement, notice or refund sent pursuant to this order reflecting a credit balance in the amount of less than fifteen dollars ($15.00) is returned to respondent by reason of the fact that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall have no further obligation to send any additional statement, notice or refund with respect to the credit balance in question; *provided, however,* that, in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph III.B.

B. When a customer requests by mail, a refund of a credit

balance in any amount which had been reflected at any time on such customer's account within the six (6) year period preceding such request, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with the reason(s) for refusing to refund the amount requested and supporting documentation, when requested and available, of the reason(s).

IV.

It is further ordered, That a credit balance shall be deemed to be created (1) in the case of a central billing account, at the end of the billing period in which the credit balance is first recorded on a customer's account; *provided, however,* that whenever the recorded amount of an existing credit balance is changed, the new credit balance, if any, resulting from such change shall be deemed to be created at the end of the billing period in which the change occurred, and respondent's obligations under this order with respect to the credit balance existing prior to such change shall be terminated and shall be replaced by its obligations under this order with respect to the new credit balance created by said change, and (2) in the case of a direct billing, at the time of receipt of the excess payment.

V.

It is further ordered, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties.

VI.

It is further ordered, That respondent shall maintain the following data: name and address of each customer who was sent a refund of a credit balance without request; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. Respondent shall also maintain the following data: the names and addresses of all customers who requested a refund of a credit balance but whose request was refused; the date the request was made; the date a refusal was sent to the customer; the amount of the requested refund; a copy of any written explanation for the refusal sent to the customer; and, if no written explanation for the refusal was made, a statement of the reasons for the refusal.

VII.

It is further ordered, That respondent shall retain the records

required to be maintained by Paragraph VI. of this order for a period of three (3) years and, upon request, shall produce said records for the purpose of examination and copying by representatives of the Federal Trade Commission.

VIII.

It is further ordered, That in the event the Commission promulgates a trade regulation rule affecting or governing the credit practices of companies engaged in the car rental business, the requirements of which trade regulation rule are less onerous with respect to record preservation, notices, and procedures for and timing of refunds than those contained herein, respondent may elect to comply with such provisions in lieu of the corresponding provisions of this order.

IX.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance with the obligations arising out of this order.

X.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions engaged in the receipt of payments for rental of automobiles.

XI.

It is further ordered, That respondent shall, within one hundred twenty (120) days after service of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

NORRIS INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2946. Complaint, Dec. 27, 1978 — Decision, Dec. 27, 1978

This consent order, among other things, requires a Long Beach, Calif. manufacturer and distributor of dishwashers and other major home appliances to cease misrepresenting, or making unsubstantiated claims regarding the qualities, performance or efficacy of its products.

Appearances

For the Commission: *Robert Barton* and *Laurence Kahn.*
For the respondent: *R. James Shaffer,* Long Beach, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Norris Industries, Inc., [hereinafter referred to as respondent], has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Norris Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its executive office and principal place of business located at One Golden Shore, Long Beach, California.

PAR. 2. Respondent now, and for some time last past has been, engaged in the distribution, sale and advertising of portable and undercounter dishwashers and other consumer products to the public.

PAR. 3. Respondent causes the said products to be transported from its places of business in various States of the United States to various dealers and distributors for sale to purchasers located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent at all times mentioned herein has been, and now is, in substantial competition in commerce with individuals,

firms and corporations engaged in the sale and distribution of dishwashers and other consumer products.

PAR. 5. In the course and conduct of its business, and for the purpose of inducing the sale of dishwashers and other consumer products of respondent, respondent has disseminated and caused the dissemination of advertising in national magazines distributed by mail and across state lines, and by radio and television broadcasts transmitted by radio and television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines. In addition, respondent has disseminated to dealers across state lines, product brochures and other sales literature which are available for distribution to consumers by dealers prior to and at the time of sale of the dishwashers.

PAR. 6. As used in this complaint and order, the term "advertisement" means any written or verbal statement, illustration or depiction designed to effect the sale of dishwashers or to create interest in purchasing such products, whether appearing in a radio or television broadcast; product brochure; catalog; leaflet, mailer or circular; point of purchase display; newspaper; trade publication; or magazine. The term "dishes" means plates, glasses, cups, silverware, bowls, and other items normally used in serving and in eating. The term "cookware" means pots, pans, roasters, and other items normally used in baking or cooking. The term "utensils" means "dishes," "cookware," and any other items normally and customarily placed in a dishwasher.

PAR. 7. Among the advertisements so disseminated or caused to be disseminated by respondent are those attached as Exhibits A-J of the complaint.

PAR. 8. Said Exhibits A-J and other advertisements represent, directly or by implication, that Waste King dishwashers can completely clean baked-on, cooked-on, and other food soils from roasters, pots and pans, and other cookware placed in the dishwashers.

PAR. 9. At the time respondent made the representations alleged in Paragraph Eight of the complaint, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 10. In truth and in fact, contrary to respondent's representations in Paragraph Eight of the complaint, Waste King dishwashers will not completely clean baked-on, cooked-on, and other food soils from roasters, pots and pans, and other cookware placed in the dishwashers. Therefore, said advertisements are deceptive or unfair.

PAR. 11. Said Exhibits A-J and other advertisements represent, directly or by implication, that Waste King dishwashers can completely clean dishes, cookware, and other utensils placed in the dishwasher without prior hand-scraping, hand-scouring, or hand-rinsing.

PAR. 12. At the time respondent made the representations alleged in Paragraph Eleven of the complaint, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 13. In truth and in fact, contrary to respondent's representations in Paragraph Eleven of the complaint, Waste King dishwashers will not completely clean dishes, cookware, and other utensils placed in the dishwasher without prior hand-scraping, hand-scouring, or hand-rinsing. Therefore, said advertisements are deceptive or unfair.

PAR. 14. Said Exhibits A-J and other advertisements represent, directly or by implication, that no hand-scraping, hand-scouring, or hand-rinsing of soft food waste on dishes, cookware or other utensils is necessary before placing the utensils in a Waste King dishwasher because the disposo-drain will remove all such soft food waste from the dishwasher.

PAR. 15. At the time respondent made the representations alleged in Paragraph Fourteen, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are unfair and deceptive.

PAR. 16. In truth and in fact, contrary to respondent's representations in Paragraph Fourteen, the disposo-drain on the Waste King dishwashers will not remove all soft food waste from the dishwashers. Therefore, said advertisements are unfair or deceptive.

PAR. 17. Contrary to the representations alleged in Paragraph Fourteen, the owners manuals for the Waste King dishwashers, which are customarily provided to consumers only after they purchase the dishwashers, instruct the user to scrape all food waste from dishes, pots, pans and silverware, and to pre-rinse starchy foods such as cereal or potatoes.

PAR. 18. (a) The instructions in the owners manuals are material facts in view of the representations made in the advertising as set forth in Paragraph Fourteen of the complaint. Said advertisements fail to reveal these materials facts and are therefore deceptive or unfair. (b) Said advertisements are also materially inconsistent with the instructions in the owners manuals. Therefore, the said advertisements are deceptive or unfair.

PAR. 19. Said Exhibit A-J and other advertisements, by stating that the "Sani-heat" cycle has a 165° final rinse which sterilizes

thoroughly, represents, directly or by implication, that this cycle destroys all harmful and other bacteria and microorganisms.

PAR. 20. At the time respondents made the representations alleged in Paragraph Nineteen, they did not possess and rely on a reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 21. In truth and in fact, contrary to respondents' representations in Paragraph Nineteen, the "Sani-heat" cycle does not destroy all harmful and other bacteria and microorganisms on dishes, pots and pans. Therefore, the said advertisements are deceptive or unfair.

PAR. 22. Said Exhibit H and other advertisements represent, directly or by implication, that the "Cookware Cycle" is specifically designed to wash cookware, such as pots, pans and roasters, completely clean of baked-on, cooked-on, greasy, and other types of food soil.

PAR. 23. At the time respondent made the representations alleged in Paragraph Twenty-Two of the complaint, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 24. In truth and in fact, contrary to respondent's representations in Paragraph Twenty-Two, the Cookware Cycle was not specifically designed to wash cookware, such as pots, pans and roasters, completely clean of baked-on, cooked-on, greasy, and other types of food soil. Therefore, said advertisements are deceptive or unfair.

PAR. 25. Said Exhibits A-J and other advertisements represent, directly or by implication, that all the stainless steel parts in the Waste King dishwasher are rustproof.

PAR. 26. At the time respondent made the representations in Paragraph Twenty-Five of the complaint, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 27. In truth and in fact, contrary to respondent's representations in Paragraph Twenty-Five, all the stainless steel parts are not rustproof. Therefore, said advertisements are deceptive or unfair.

PAR. 28. Said Exhibit F and other advertisements represent, directly or by implication, that dishes placed in the upper rack of Waste King dishwashers will get as clean as those placed in the bottom rack.

PAR. 29. At the time respondent made the representations alleged in Paragraph Twenty-Eight of the complaint, it did not posses and rely on a reasonable basis for such representations. Therefore, said representations are deceptive or unfair.

PAR. 30. Exhibits C–E and other advertisements represent, directly or by implication, that the baskets in the Waste King dishwashers can be randomly loaded and that there are no special instructions to follow when loading the dishwashers.

PAR. 31. At the time respondent made the representation alleged in Paragraph Thirty, it did not possess and rely on a reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 32. In truth and in fact, contrary to respondent's representations in Paragraph Thirty, the baskets in the Waste King dishwasher cannot be randomly loaded and there are special instructions to follow when loading. Therefore, said advertisements are deceptive or unfair.

PAR. 33. Contrary to the representations alleged in Paragraph Thirty, the owners manuals for the Waste King dishwashers, which are customarily provided to consumers only after they purchase the dishwasher, do contain special instructions for the user to follow when loading the dishwashers.

PAR. 34. (a) The instructions in the owners manuals are material facts in view of the representations made in the advertising set forth in Paragraph Thirty of the complaint. Said advertisements fail to reveal these material facts and are therefore deceptive or unfair. (b) Said advertisements are also materially inconsistent with the instructions in the owners manuals and are therefore deceptive or unfair.

PAR. 35. Said Exhibits A and G, and other advertisements, represent, directly or by implication, that all Waste King dishwashers are quiet in operation or quieter in operation than competing makes of dishwashers.

PAR. 36. At the time respondent made the representations alleged in Paragraph Thirty-Five of the complaint, it did not possess and rely on a reasonable basis for such representations.

PAR. 37. Exhibits A, C, D, E, and G, and other advertisements, represent, directly or by implication, that the features described in the advertisements apply to all Waste King dishwashers.

PAR. 38. In truth and in fact, contrary to respondent's representations in Paragraph Thirty-Seven, certain features described in the advertisements, such as the insulation, random loading, and the ability of the dishwasher to wash dishes on top as clean as those dishes on the bottom rack, do not apply to all the Waste King dishwasher models. Because the advertisements fail to disclose these material facts, said advertisements are deceptive or unfair.

PAR. 39. Said Exhibits A–J and other advertisements represent,

directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraphs Eight, Eleven, Fourteen, Nineteen, Twenty-Two, Twenty-Five, Twenty-Eight, Thirty, and Thirty-Two, whereas in truth and in fact respondent had no reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 40. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of dishwashers sold by respondent by reason of said erroneous and mistaken belief.

PAR. 41. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair methods of competition, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

EXHIBIT A

WASTE KING DISHWASHERS
LIKE WASTE KING

The best of everything. That's what you get with Waste King. A modern masterpiece in stainless steel, for those who want a better product, advanced features, long-lasting service.

Stainless steel is superior

It's tough. Rustproof. Sanitary. Unlike the porcelain or plastic coatings used by many manufacturers, stainless steel can't wear off, chip, peel or crack. That's why we use it where the action takes place. For the tank and inner door of the dishwasher, the wash arms that do the scrubbing and rinsing, the basket guide rails.

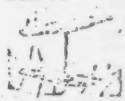
That's why we can guarantee all stainless steel parts for 20 years against failure due to corrosion.

Load it the easy, random way

There are no special instructions to follow when loading a Waste King dishwasher. Both baskets pull out all the way for easy accessibility. Both take a mixed load of dishes and utensils. Bowls can go on top of other dishes. Removable dividers in the upper basket provide space for oversize serving dishes, utensils.

Three-way washing action

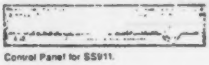
Fast-moving jets of hot, detergent-activated water from two counter-rotating wash arms reach every corner of the steel tank. This two-level, full-wash cleansing system not only cleans completely, it permits random loading of each basket. The lower arm sends water up through the lower basket. The upper arm jets water up through the upper basket, as well as down through the dishes below it.



(SS777 has single arm only)

Superscrub and Sani-heat

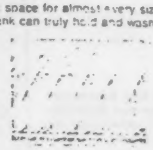
The Superscrub cycle extends wash time to get tough jobs like roasters really clean. Sani-heat, a 165-degree final rinse sterilizes thoroughly. A silent heater provides humidity-free drying.



Control Panel for SS911.

Waste King pampers the load

Waste King's big baskets provide space for almost every size and shape. The huge-capacity tank can truly hold and wash a day's dishes for a family of five. There's no need to worry about breakage. Plates are spaced by cushioned loops to prevent chipping; M-shaped supports make secure cradles for the most fragile stemware. Flatware baskets have lidded sections to hold small items.



Insulation cuts down noise

Waste King dishwashers are ultra-quiet in operation, thanks to Hush-coat, a dense acoustical material that dampens sound at the source. In addition to hush-coating, the tub, sides, back and door are wrapped with a thick blanket of fiberglass.

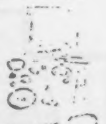
Disposo-drain ends pre-rinsing

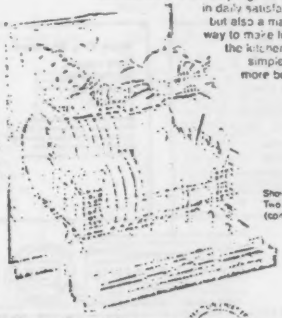
No scraping. No pre-rinsing. Just flick off bones and large food pieces. Waste King's efficient Disposo-drain will flush away soft waste such as corn, spaghetti, potatoes, salad. There's no screen to clean or to trap tiny food particles.

The Rinse-and-Hold cycle is a quick rinse to remove surface soil from dishes to be held for a full washing cycle later on.

We build it. We back it with a super-warranty

For more than 30 years, we have been building dishwashers to new standards of performance, quality and craftsmanship. We back them with a super-warranty that's the strongest in the industry. Waste King dishwashers are not only a great investment in daily satisfaction, but also a marvelous way to make life in the kitchen easier, simpler and more beautiful.





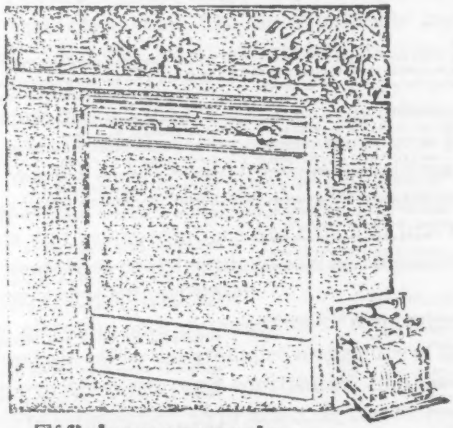
Shown: Model SS911
Two portable models (convertible) also available

Waste King
Stainless Steel Dishwashers

For further information and complete warranty details, see your dealer, or write Waste King, Dept. D, 5115 District Blvd., Los Angeles, Ca. 90040

EXHIBIT B

53



Waste King: super-sturdy stainless steel dishwasher with the strongest warranty in the industry.

A huge capacity dishwasher with full width wash arms, one under each basket, for 3-way double wash and triple rinse action. Pots and pans go in either basket, the Disposadrain eliminates need for hand-rinsing dishes. The silent heater provides thorough and 0 mid to free drying. Waste King's dishwashers have surgical steel tanks that don't chip, peel, crack or rust. Inner doors, wash arms and guide rails are also stainless steel. MODEL 911

Efficiency experts. Waste King appliances do the job quieter, easier, speedier.

For the kitchen that thought it had everything . . . LOOK!

Charcoal Gas Grill lets you char-broil indoors and enjoy Summer-like outdoor taste. Temperatures for cooking are controlled by the turn of a knob. For steaks, fish, chicken, ribs, shish-kebab.

Waste King Disposers

Tiger rugged, panther quiet, a pussy cat to install

Grinds up bones, pits, stalks, rinds, stalks. No need to sort garbage. Waste King's patented anti-jam grinding prevents jams before they can happen.

WASTE KING

8131 Dice Blvd Los Angeles Calif 90040

Eastern Sales Office: 615 Kinnwood Parkway, Suite 5A • Secaucus, New Jersey 07094 • (201) 330-0400

EXHIBIT C

WASTE KING®
THE DISHWASHER THAT'S SICK OF BEING CONFUSED WITH OTHER BRANDS.

Doc, I'm a good dishwasher. I work hard. I clean. I scrub...

Yes.

But people keep confusing me with other brands.

A classic case of identity crisis.

What hurts is that it's me—Waste King—who's got the double wash arm that gets things really clean, no matter where you stack 'em.

I see.

You can load both my baskets any way you want and even grimy pots and pans come out sparkling clean.

You've got a thing about cleanliness?

Yes, I'm obsessed with it!

Very revealing.

Look, Doc, don't get me wrong. I'm no sissy. I'm tough. In fact, it's me, Waste King, who has the stainless steel interior and the strongest warranty there is.

You have great inner strength.

Yeah, but like most tough guys, I've got my gentle side

A split personality.

Yes and no. But getting back to my gentle side, I've got these cushioned loops on my baskets that protect dishes and glassware from chipping.

I notice you have removable baskets and adjustable racks.

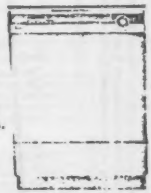
Yeah, I'm very flexible. You can adjust 'em to hold just about anything you want.

Look, you've got double wash arm, stainless steel interior, flexible baskets, cushioned loops... so what's the problem?

People don't know who I am! So please, Doc. Tell me, what should I do?

Well, Mr. King Waste, maybe you should advertise.

The name's Waste King! Waste King! Waste King!



Waste King

THE STAINLESS STEEL DISHWASHERS

For complete warranty information on all Waste King products, see your Dealer or write Waste King, Dept. A, 3300 Fernhill Blvd., Los Angeles, Ca. 90039 • Eastern Zone Office: 675 Sherwood Parkway, Suite 8A, Mountainside, N.J. 07092 (201) 233-5422

EXHIBIT D

...APRIL 13, 1976

...the quarter.

The jewelry div... which brought in 29 per cent of 1975 sales and 15 per cent of earning... l a 15 per cent sales gain.

The poodle divi... had a 32 per cent first-quarter sales gain, Tassio said. That division co...tributed 12 per cent of 1975 sales and 6 per cent of its revenue.

Scotty's Finds March a Record Sales-Setter

WINTER HAVEN, ...a. (FNS) — Scotty's, Inc., reported record sales for March, the first t... its monthly volume exceeded $8 million, and the month's gain was the ... est since August of 1973, according to James W Sweet, chairman.

Sales for the mo... jumped 31.7 per cent to $8,328,627 from $6,339,-450 for the same per... a year ago.

Volume for the n... months ended March 31 rose 8.1 per cent, $61,-532,606 against $56,9...3 last year.

Tappan Reg... rs Dip Of 10% in Year's Sales

MANSFIELD, O... (FNS) — Sales of Tappan appliances and ranges declined 10 per cent to ...100,739,000 from $110,502,000 the company's annual report showed.

Sales of cabinet... eased 3 per cent to $23,867,000 from $21,744,000. Sales of Lawson prod... (metal containers) increased 38 per cent to $15,-756,000 from $11,981,... Heating and air conditioning sales declined 25 per $51,791,000.

...products declined to

...Sales Executive Club's weekly luncheon at the Waldorf-Astoria here, advertising promotion director E.J. Kreitz told the audience of about 300 that Kresge expects its sales volume to jump from its present $6.8 billion to $12 billion by 1980.

That nearly two-fold increase in sales, besides the massive K-Mart expansion plan, is what leads the company to believe it will move into the second place slot ahead of Penney, Kreitz said.

"I think we'll certainly overtake Penney's before the end of the decade," Kreitz said in answer to a question from the audience.

On the basis of 1975 sales volume as reported by the companies, Sears, Roebuck is the nation's leading non-food retailer ($13.6 billion), followed by Penney ($7.69 billion) and Kresge ($6.8 billion).

A spokesman for Penney's at the company's headquarters here refuse...l to flatly contradict Kreitz's

E.J. KREITZ: We'll be bigger than J.C. Penney "before the end of the decade." Photo by Pierre Schumann

Many gasped audibly when Kreitz compared Kresge's pre-K Mart 1975 volume of about $500 million to its 1975 sales of nearly $7 billion.

Among the other points touched on by Kreitz at the luncheon were:

• Internal Kresge figures which indicated the company accounts for 18 per cent of the top five general merchandisers' combined annual volume of $37.7 billion, as com-

...ly new outlets in ... familiar with the name, turn a profit in under a year. K-Mart stores in new trading areas take between 18 to 25 months to turn a profit.

• K-Mart does 20 to 25 per cent of its total volume in private-label goods Kreitz said, however, that private-label sales will probably "remain stable in the near future" and "will never get to be a major portion of the business."

• K-Mart generally concentrates on three types of new units: The "regular" size store (61,000 to 90,000 square feet); the "Group 7" store (65,000 square feet), and the "Group 9" store serving smaller markets (40,000 square feet).

Simmons Expects Net To Top the '73 Record

...noted that the proposed increase in

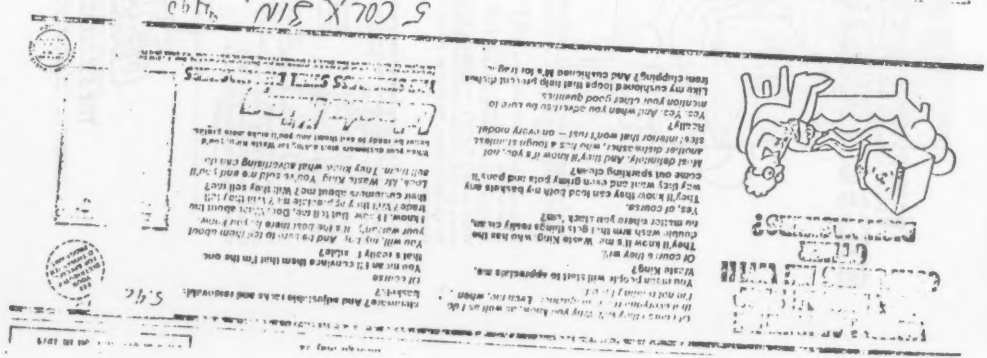
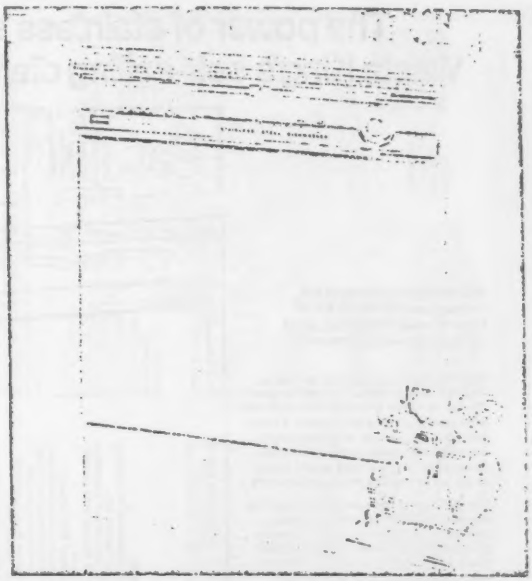


Exhibit E

more bill-in sales features

WASTE KING: quieter, better, longer lasting



Waste King Stainless Steel Food Disposer

Grinds up the tough stuff, bones, pits, cobs, rinds and stalks. No need to sort garbage. Patented no-jam swivel impellers. MODEL SS8000

Waste King stainless steel dishwasher is backed by the strongest warranty in the industry.

Waste King has 2 full width wash arms - one under each basket for 3-way action, provides double wash, triple rinse for really clean dishes. Rugged baskets with curliques to separate dishes and prevent cracking and breaking. Large capacity with random loading is simple enough for a child. Waste King dishwashers have stainless steel tanks that can't chip, peel, crack or rust. Inner doors, wash arms and guide rails are also stainless steel. MODEL 911

THERMADOR

For complete warranty details on all Thermador products, see your Dealer or write Thermador

THERMADOR / WASTE KING DIVISION

WASTE KING

For complete warranty details on all Waste King products, see your Dealer or write Waste King

5123 District Blvd., Los Angeles, Ca. 90040

Norris Industries Booth 2438 at the NAHB Convention.

Honest Hour

3-29-37

5

KITCHEN BUSINESS - DEPT. R EXHIBIT F

The power of stainless steel. Waste King's self-selling dishwashers.

The strongest warranty in the industry, and an interior full of features make Waste King stand out as a royal sales performer

Stainless steel gives you more sales clout; it's tough, durable and withstands the rigors of hard use. Waste King's stainless steel tank, inner door, wash arms and guide rails won't chip, peel, crack or rust. A full-width wash arm under each basket provides three-way, double-wash and triple-rinse action. Dishes on top get as clean as those on the bottom.

The long-playing **Superscrub** cycle extends wash time for tough jobs like casseroles, pots, pans, crusty roasters. These utensils go in the same load with china and crystal. Waste King's huge tank can truly hold and wash a day's dishes for a family of five.

Sani-heat is a 165 degree final rinse that sterilizes and rinses thoroughly. A silent heater provides humidity-free drying for a cool kitchen and spot-free dishes.

Get our new profit-making promotional plans to help you sell faster and easier. See your distributor now.

Adjustable baskets extend fully; upper one has removable dividers. Plate-cushions separate dishes and prevent chipping. Silverware-cradles and wash arms permit random loading.

Waste King
The Stainless Steel Dishwashers

INSINKERATOR / WASTE KING DIVISION

DISHWASHERS
DISPOSERS
COMPACTORS
CHAR-GLO
GAS FIRED BARBECUES

For further information and complete warranty details see your distributor or write Waste King, [illegible]

6

Exhibit G

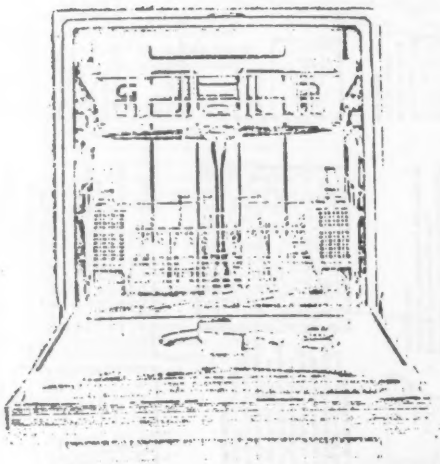
Our dishwashers are designed to serve you better.
Whole King Stainless Steel Tanks — Durable and Trouble Free
A common cause of tank failure is damage to the protective surface. Plastic coatings are easily scratched. Once the coating goes, rust and corrosion set in.
Our tanks are stainless steel through and through. No chipping, cracking or peeling. That's why more and more commercial dishwashers are made of stainless steel.
Exclusive Basket Design makes loading easy.
Big, sturdy baskets provide enormous capacity. And because our two level wash system lets you load randomly — bowls, pots and pans can go in either basket — you can take advantage of every inch of space.
Unique Upper Basket (SS-911) lets you load a whole basket of pots and bowls or ...
Shift racks move out for easy inner loading.
M shaped racks cradle irregular silverware
Narrow width dishes let you double stack cups
Lidded compartment for small items
Two silverware baskets can be elevated so they won't snag. Removable for easy handling.
Place bowls over dishes. 3-way washing action permits random loading (SS-918, SS-911)
Oval tipped prongs space plates to prevent chipping
Exclusive Full Width, Full-Depth Wash System.
Most dishwashers have two levels of spinning wash arms. But ours has only one. It's a full width stainless steel arm that provides a water distribution to every square inch of dishes. Not only doesn't it entangle, but it allows you to wash larger loads of dishes. Pots and pans can be loaded in either upper or lower baskets without fear of interfering with the powerful wash action and proper water circulation.
Forget Tedious Hand Rinsing Forever
Just scrape off the large scraps and load the dishwasher. Our thorough cleaning removes even the most stubborn food particles. Which means the dishwasher can be used as a full-fledged disposer, so you can take care of soft food wastes such as corn, spaghetti, potatoes and vegetables.
Sanitary, homelike free drying
Special condensation drying process dries the entire load perfectly. It's the same process used in the finest home dishwashers. Dishes come out sanitized and ready to put away. No spotty, hand-dried look. No towels to soil. This process only uses the heat it needs to dry the dishes, so it's the most economical way to dry dishes.
Hush Coat Sound Control lining keeps your kitchen almost ghost quiet. Extra sound insulation on front, back, and sides — with a dense, thick fiberglass blanket. Our dishwashers are truly super quiet!

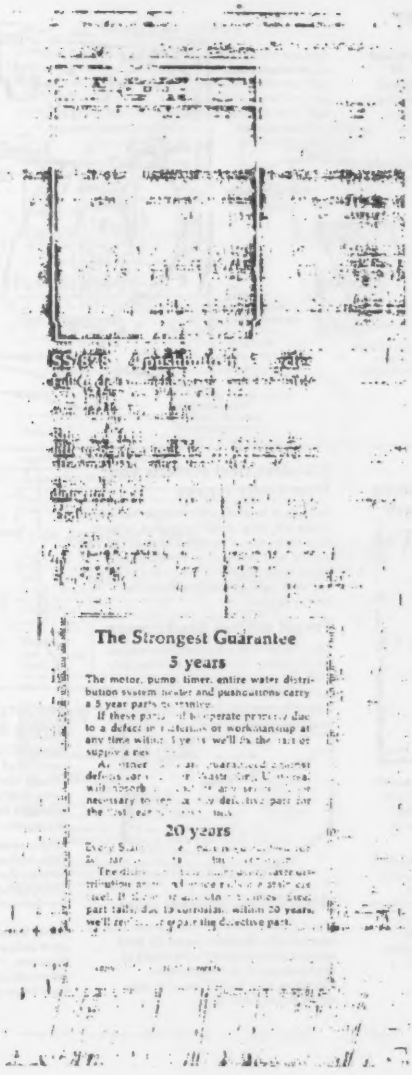
Exhibit H

SS&S
(18.1)

Waste King Universal

The stainless steel dishwasher





The Strongest Guarantee

5 years

The motor, pump, timer, entire water distribution system header and pushbuttons carry a 5 year parts guarantee.

If these parts in normal private use prove to be defective in material or workmanship at any time within 5 years we'll fix the unit or supply a new one.

20 years

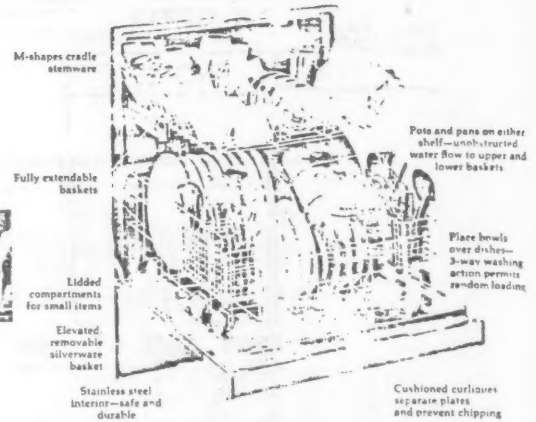
ıclusive basket design akes loading easy

...ading provides places and ...ces for almost everything. "M" ...aped supports prevent damage to ...gile stenware. China-separating ...ticules prevent chipping. Lidded ...compartments for small items in ...erware baskets.

...e upper basket rolls out completely. ...ach the back without reaching into ...e washing chamber.

...shaped racks ...dle fragile ...mware

Knuckled cutlicues space plates to prevent chipping


M-shapes cradle stemware
Fully extendable baskets
Lidded compartments for small items
Elevated, removable silverware basket
Stainless steel interior—safe and durable
Pots and pans on either shelf—unobstructed water flow to upper and lower baskets
Place bowls over dishes—3-way washing action permits random loading
Cushioned cutlicues separate plates and prevent chipping

ıclusive "Full Width, ıll Depth" 3-way washing ystem for a cleaner wash

...ir exclusive double wash arm system ...like having two dishwashers in one. ...o full-width stainless steel arms ...ure complete water circulation in ...ery nook and cranny.

...unter-rotating distributor arms with ...ter jetting up and down, from ports ...t act like stainless steel nozzles, ...roughly scrub all surfaces. The upper ...wash the dishes in the upper ...d lower baskets. The lower arm ...shes the dishes in the lower basket, ...owing total random loading of ...th baskets.

Stainless steel protects you from costly repairs

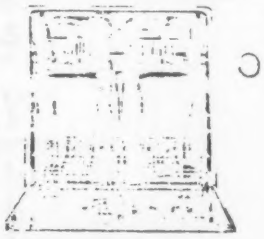
Porcelain or plastisol coatings frequently chalk off, chip, crack or peel. A scratch or a chip from a dropped utensil can rust all the way through in a surprisingly short time. Stainless steel cannot chip, crack or peel, protecting you from costly repairs.

Forget tedious hand rinsing

Our Disposo-Drain eliminates tedious hand rinsing. Just scrape off the bulky stuff. Remaining wastes are automatically flushed away. There's no screen to trap tiny food particles.

Hush-Coat--whisper quiet

Hush-Coat is a dense, elastic, acoustical material that deadens sound. Its thick acoustical mass muffles the sound of the washing action. It dampens vibration. We Hush-Coat all 5 sides of the dishwasher tank.



Sanitary, humidity free drying for a cool kitchen

Patented ThermoMatic heater creates currents of clean, dry, heated air that rise slowly, blot up moisture, absorb it, and carry it off to the cooler stainless steel sides and door. Moisture condenses, drains into the pump basin.

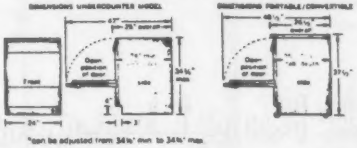
This continuous heat transfer system dries without the need for motorized blowers that suck in outside air. Dries with the clean heated air within the dishwasher. Safe. Sanitary. Silent.

Other features: Tamper proof cycle indicator • Automatic rinse agent dispenser • Safety door latches • Infinitely adjustable springs for proper door balance, even with custom panels

989

Easier to install and service

A Waste King Universal Dishwasher is easily secured to the underside of the counter. No need to bolt it to the floor. Adjustable undercounter tabs affixed to the dishwasher hold the dishwasher in position. Levelling legs permit height adjustment from 34 1/8" min. to 34 1/4" max.



*can be adjusted from 34⅛" min. to 34¼" max.

Specifications:

		Model SS/878
Elect. (120V, 60 cyc.)	Motor Load (Amps) Total Other Load (Amps) Maximum Load (Amps)	7 6 7
Heater Element	Dry Rating	700
Motor	RPM Frequency Phase (single) Horsepower	3450 60 cycle ⅓
Water	Total Consumption Pressure Requirements*	13 20-120
Approx. Shipping Weight**		107
Approx. Net Weight**		92

*Dynamic Pressure with water running at the sink adjacent to dishwasher.
**Add 43 lbs. for Portable/Convertible Models.

Cycle Sequence Charts

Cycle	Sequence							Cycle Length (Minutes)
Full Cycle	Pre-Wash	Rinse	Wash	Rinse	Rinse	Sparkle Rinse	Dry	60
Cook-ware	Pre-Wash	Rinse	Wash	Rinse	Rinse	Sparkle Rinse		34*
Rinse and Hold	Rinse							8*

*Plus time required for timer to advance to START. Total 60 minutes.

Los Angeles California 90058
Kitchen Appliances Women Trust

Leading manufacturers of Disposers - Stainless Steel Dishwashers
Built-in Gas & Electric Ovens - Electric Self-Cleaning Ovens
Char Gio® Gas Barbecue Broilers

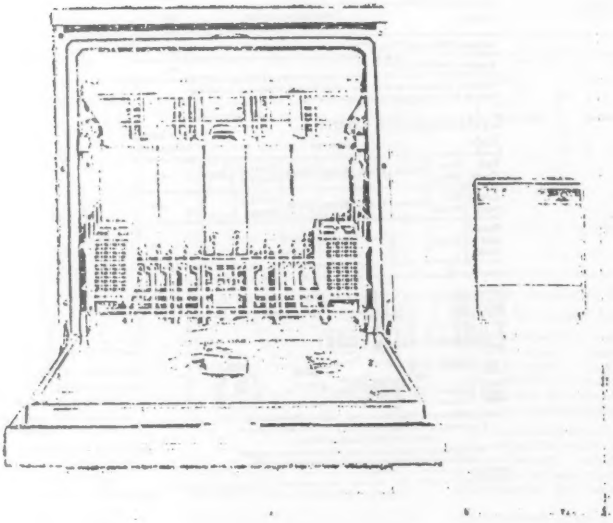
We've produced and sold over 5,000,000 food waste disposers.
Over 900 factory trained service experts across the country.

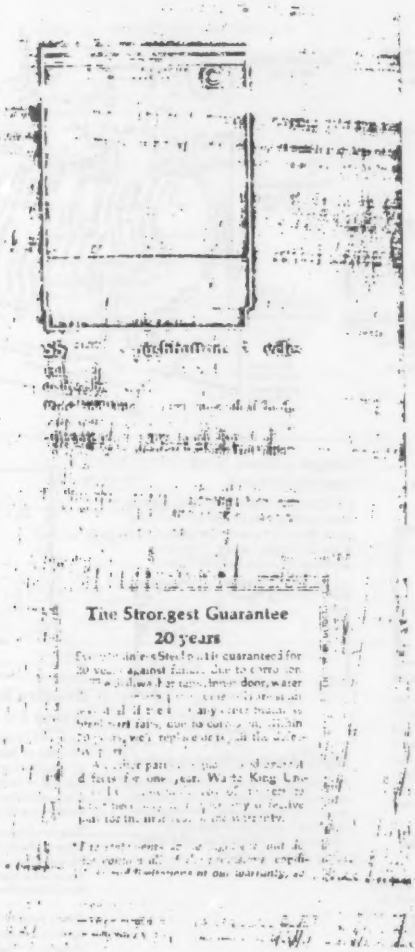
Exhibit I

9[illegible]
V 18.31

Waste King Universal

The stainless steel dishwasher





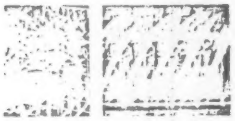
The Strongest Guarantee

20 years

ive basket design loading easy

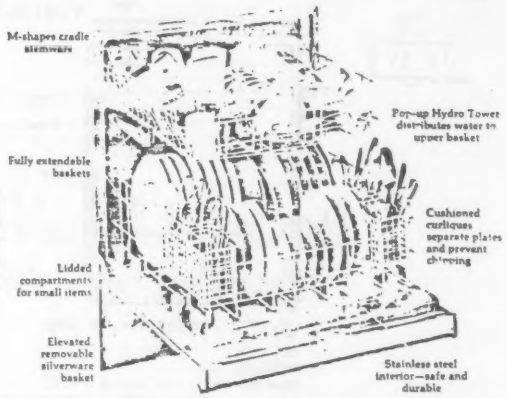
...ts prevent damage ...stemware. China-separating ...s prevent chipping. Lidded ...ments for small items in ...baskets.

...er basket rolls out completely. ...e back without reaching into ...hing chamber.



d racks
igile

Knuckled curlicues space plates to prevent chipping


M-shapes cradle stemware
Fully extendable baskets
Lidded compartments for small items
Elevated removable silverware basket
Pop-up Hydro Tower distributes water to upper basket
Cushioned curlicues separate plates and prevent chipping
Stainless steel interior—safe and durable

Jp-Hydro-Tower des corner-to-corner ng action

...dro-Tower pops up from the ...stributor arm to wash dishes ...pper basket. Water swirls and ...through scientifically located ...n the lower arm and pop-up ...Streams of hot water cover ...other dishwashers miss, and ...stubborn food wastes from ...evice of every dish.

less steel protects you costly repairs

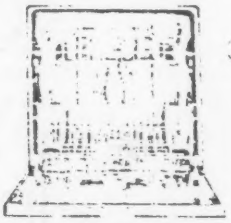
...n or plastisol coatings frequently ...t, chip, crack or peel. A scratch ...ts in a dropped utensil can rust ...ay through in a surprisingly ...me. Stainless Steel cannot chip, ...r peel, protecting you from ...repairs.

Forget tedious hand rinsing forever!

Our Disposo-Drain eliminates tedious hand rinsing. Just scrape off the bulky stuff. Remaining wastes are automatically flushed away. There's no screen to trap tiny food particles.

Hush-Coat--whisper quiet

Hush-Coat is a dense, black acoustical material that deadens sound. Its thick acoustical mass muffles the sound of the washing action. It dampens vibration. We Hush-Coat all 5 sides of the dishwasher tank.



Sanitary, humidity free drying for a cool kitchen

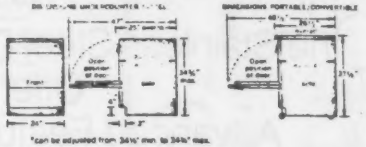
Patented ThermoMatic heater creates currents of clean, dry, heated air that rise slowly, blot up moisture, absorb it, and carry it off to the cooler stainless steel sides and door. Moisture condenses, drains into the pump basin.

This continuous heat transfer system dries without the need for motorized blowers that suck in outside air. Dries with the clean heated air within the dishwasher. Safe. Sanitary. Silent.

Other features: Tamper proof cycle indicator • Automatic rinse agent dispenser • Safety door latches • Infinitely adjustable springs for proper door balance, even with custom panels.

[illegible] install and service

[illegible] Universal Dishwasher is easily secured [illegible] inside of the counter. No need to bolt it to the [illegible] undercounter tabs affixed to the dishwasher hold the dishwasher in position. Leveling legs permit height adjustment from 34⅛" min. to 34⅞" max.



*can be adjusted from 34⅛" min. to 34⅞" max.

Specifications:

		Model 55/777
Elect. (120V, 60 cyc.)	Motor Load (Amps) Total Other Load (Amps) Maximum Load (Amps)	7 6 7
Heater Element	Dry Rating	700
Motor	RPM Frequency Phase (single) Horsepower	3450 60 cycle ½
Water	Total Consumption Pressure Requirements*	15 20-120 lbs.
Approx. Shipping Weight**		102
Approx. Net Weight**		87

*Dynamic Pressure with water running at the sink adjacent to dishwasher.
**Add 62 lbs. for Portable/Convertible Models

Cycle sequence charts

Cycle	Sequence							Cycle Length (Minutes)
Full Cycle	Pre-Wash	Rinse	Wash	Rinse	Rinse	Sparkle Rinse	Dry	60
Rinse and Hold	Rinse							8*

*Plus time required for timer to advance to START. Total 80 minutes.

WASTE KING
UNIVERSAL
CJT
Los Angeles, California 90058
Kitchen Appliances Women Trust
UL
Leading manufacturer of Disposers • Stainless Steel Dishwashers
Built-in Gas & Electric Ovens • Electric Self Cleaning Ovens
Char Glo® Gas Barbecue Broilers
We've produced and sold over 3,000,000 food waste disposers
Over 900 factory trained service centers across the country.
[illegible]

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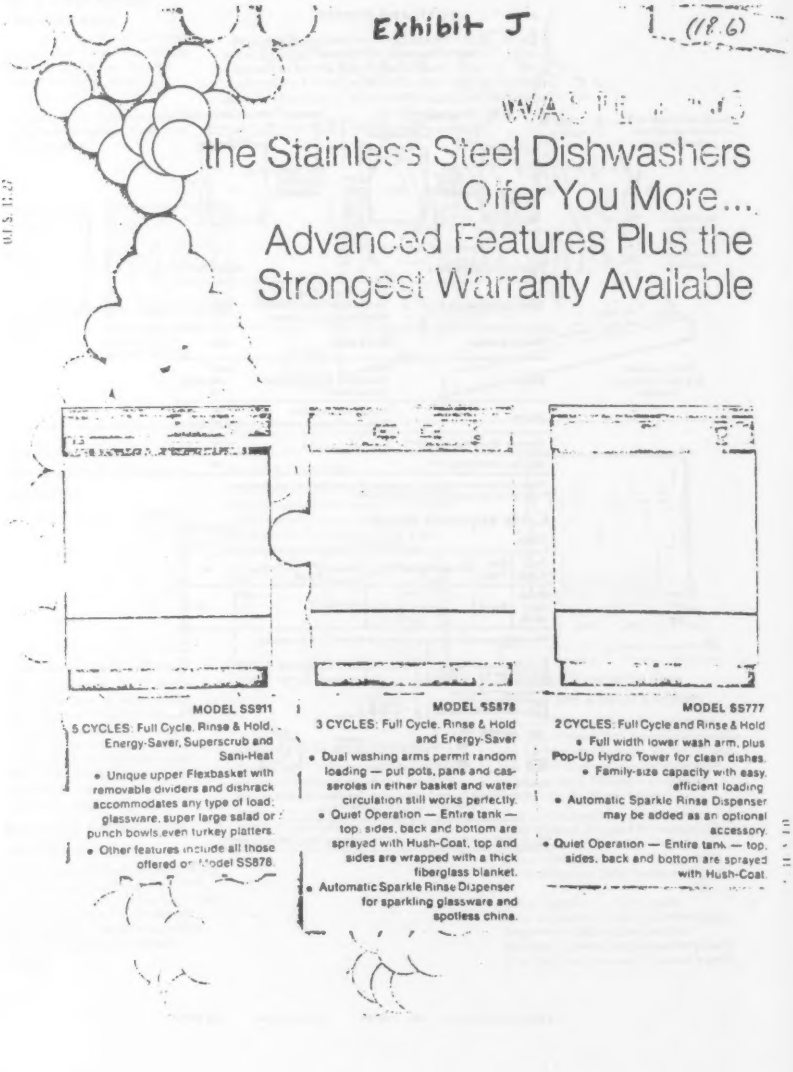
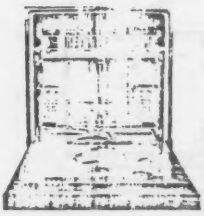
Exhibit J (18.6)


the Stainless Steel Dishwashers
Offer You More...
Advanced Features Plus the
Strongest Warranty Available
MODEL SS911
5 CYCLES: Full Cycle, Rinse & Hold, Energy-Saver, Superscrub and Sani-Heat
• Unique upper Flexbasket with removable dividers and dishrack accommodates any type of load; glassware, super large salad or punch bowls,even turkey platters.
• Other features include all those offered on Model SS878.
MODEL SS878
3 CYCLES: Full Cycle, Rinse & Hold and Energy-Saver
• Dual washing arms permit random loading — put pots, pans and casseroles in either basket and water circulation still works perfectly.
• Quiet Operation — Entire tank — top, sides, back and bottom are sprayed with Hush-Coat, top and sides are wrapped with a thick fiberglass blanket.
• Automatic Sparkle Rinse Dispenser for sparkling glassware and spotless china.
MODEL SS777
2 CYCLES: Full Cycle and Rinse & Hold
• Full width lower wash arm, plus Pop-Up Hydro Tower for clean dishes.
• Family-size capacity with easy, efficient loading
• Automatic Sparkle Rinse Dispenser may be added as an optional accessory.
• Quiet Operation — Entire tank — top, sides, back and bottom are sprayed with Hush-Coat.

Waste King dishwashers have a noise reduction system that keeps operating noises [illegible] Hush-Coat is a dense, black acoustical sound deadening material. Its thick mass muffles the sound of the washing action. Hush-Coat is sprayed on the entire tank — top, sides, back and bottom. On Models SS911 and 878 the top and sides are also wrapped with a thick fiberglass blanket. Waste King dishwashers are built to run quietly!



Porcelain and plastisol used by some manufacturers are protective coatings that frequently chalk off, chip, crack or peel. A scratch or a chip from a dropped utensil can rust all the way through in a surprisingly short time. Stainless Steel cannot chip, crack or peel. It is always clean, shiny and bright. Waste King's warranty assures you Waste King dishwasher tanks are the most durable ever built.

After the final rinse, Waste King's efficient heater safely dries the clean, washed dishes. Currents of dry, heated air rise slowly, blot up moisture, absorb it and carry it off to the cooler stainless sides and door where the moisture condenses and drains into the pump basin.

This continuous heat transfer drying system [illegible] the need for a motorized blower sucking in outside air. The Waste King humidity free system dries with clean heated air within the dishwasher itself. It is safe, sanitary and silent.

STRONGEST WARRANTY AVAILABLE

HIGHLIGHTS OF WASTE KING WARRANTY

FULL ONE YEAR WARRANTY against manufacturing defects. All parts and service labor are included.

PLUS EXTENDED LIMITED WARRANTY

The following parts are warranted against manufacturing defects for FOUR YEARS following the expiration of the full warranty: motor, pump, timer, heater, water distribution system, and pushbutton switch. Service labor will be the owner's responsibility. All Stainless Steel parts are warranted against failure due to corrosion for NINETEEN YEARS following the expiration of the full warranty. Service labor will be the owner's responsibility.

Contact your dealer for details or write to Waste King.

The exclusive double arm washing system (Models SS911 and 678) is like having two dishwashers in one. Two full-width stainless steel arms assure complete water circulation throughout the tank. There's one arm under each basket. Detergent activated hot water is forced through each arm by a powerful pump.

Counter-rotating distributor arms have ports that act like nozzles, jetting water up and down to scrub all surfaces thoroughly.

This two level "Full Width, Full Depth" system not only cleans completely but it also provides total random loading of both baskets. Bowls or pots and pans may be loaded in lower basket without affecting the washing action.

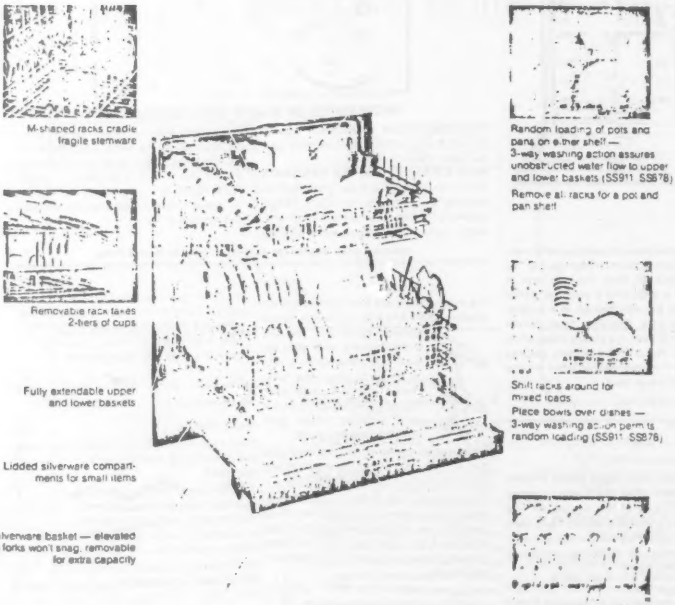
In the Model SS777, a Pop-Up [illegible] washing action of the lower arm. During the wash and rinse cycles the telescoping tower is activated. It Pops-Up to provide 2 fan-shaped jets of water for upper basket.

Waste King's Disposo-Drain eliminates tedious hand rinsing. Just scrape off the bulky stuff. Remaining wastes are automatically flushed away. There is no screen to clean or to trap tiny food particles.

Exclusive basket design makes loading easy.

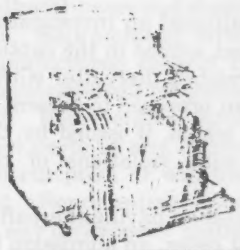
Random loading provides places and spaces for almost everything. Big, sturdy baskets provide enormous capacity. There are some differences between models, but there's a lot in common too. "M" shaped supports prevent damage to fragile stemware... chine-separating curlicues to prevent chipping...lidded compartments for small items in silverware baskets. (All models).

The upper basket rolls out completely. You can reach the back without reaching into the washing chamber. Removable dividers in the SS911 upper basket provide a shelf for elaborate oversize platters, roasters and serving dishes most people use for holiday entertaining.


M-shaped racks cradle fragile stemware
Removable rack takes 2-hers of cups
Fully extendable upper and lower baskets
Lidded silverware compartments for small items
Silverware basket — elevated so forks won't snag, removable for extra capacity
Stainless steel interior — safe and durable
Random loading of pots and pans on either shelf — 3-way washing action assures unobstructed water flow to upper and lower baskets (SS911, SS878)
Remove all racks for a pot and pan shelf
Shift racks around for mixed loads
Place bowls over dishes — 3-way washing action permits random loading (SS911, SS878)
Knuckled curlicues secure plates to prevent chipping

Stainless Steel Convertible Portable Models Also Available

U.F.S. 11.2



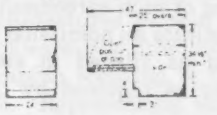
Models SS911 and SS878 are also available in Convertible Portable units. Top is handsome solid maple. Panels come in White, Coppertone, Avocado and Pastel Gold. Easy hook up. Disconnect as a convenient portable now and for Duplin-in-tallation later.

(A) Fill and drain hoses connect to your sink simply and easily. A unique Thula Sure attachment prevents water from splashing as it drains into sink.

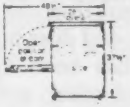
(B) Handsome hinged top covers the hose cord compartment when the dishwasher is not in use.

For Planning Guide only. For complete installation instructions write and indicate model number.

DIMENSIONS UNDERCOUNTER MODEL



DIMENSIONS PORTABLE/CONVERTIBLE



TYPICAL DISHWASHER OPENING DIMENSIONS

Cycle sequence charts:

Cycle Name	Mode	Sequence								Cycle Length*
Full Cycle	Fill	Pre-Wash	Rinse	Wash	Rinse	Rinse	Sanitize Rinse	Dry		65
Rinse & Hold	Fill	Rinse								8**
Energy Saver	Fill	Pre-Wash	Rinse	Wash	Rinse	Rinse	Sanitize Rinse			35**
Super Scrub	Fill	Pre-Wash	Rinse	Extended Wash	Rinse	Rinse	Sanitize Rinse	Extended Dry		75
Sani-Heat & Dry	Fill	Pre-Wash	Rinse	Wash	Rinse	Rinse	Sanitize Rinse	Dry		65

*Cycle length in minutes.
**Add 15 minutes for START/Hot Water Rinse.

Specifications:

		Model SS911	Model SS878	Model SS878
Electrical Rating	Motor Amps (Full Load)	6	6	6
	Heater Element	10A	10A	10A
	Motor	60Hz Frequency Phase	3450 6	3450 6
	Heater	Total Connected Load Pressure Requirements*	1440 Watts 20-120 PSI	1440 Watts 20-120 PSI
Approx. Shipping Weight		Dishwasher Complete & Portable	154 —	154 160

*Dynamic Pressure with water running at the rate of 3 gallons per minute.

CYCLE STORY — What does each cycle do...

FULL CYCLE
Designed for normal dishwashing loads. A complete operation which thoroughly washes and dries all of your dishes, glassware, silverware, pots, pans and kitchen utensils.

RINSE & HOLD
A quick rinse to remove sticky surface soil from dishes to be held for full washing cycle at a later time.

ENERGY-SAVER
Shortened cycle of washing and rinsing. But eliminates the dry cycle. Electrical usage is cut in half — a saving of about ½ kilowatt hour.

SUPERSCRUB
Heavily soiled pots, pans and dishes get an extended wash time to "Superscrub" them sparkling clean.

SANI-HEAT
Adds the extra protection of a 165 degree final rinse. Incoming water is heated by the patented Waste King heater to a high sanitizing final rinse.

Manufacturers of the finest Disposers, Dishwashers and Cent-Gri-Ders.

WASTE KING
DIVISION OF NORRIS INDUSTRIES

NORRIS INDUSTRIES

5115 District Blvd., Los Angeles, CA 90040
Phone (213) 588-6161

Form No. DA-2

Litho in U.S.A. 9/71

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enter the following order:

1. Respondent Norris Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at One Golden Shore, Long Beach, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

PART I

It is ordered, That Norris Industries, Inc., [hereinafter referred to as the respondent], its successors and assigns, either jointly or individually, and its officers, representatives, and agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, distribution or sale of dishwashers in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any dishwasher manufactured or sold by respondent can sterilize or destroy all microorganisms on utensils placed in the dishwasher.

2. Representing directly, or by implication, that the stainless steel parts in any dishwasher manufactured or sold by respondent are rustproof or will not rust under normal household conditions.

3. Representing, directly or by implication, that the disposo-drain in any dishwasher manufactured or sold by respondent will remove all soft food waste from the dishwasher.

4. Representing, directly or by implication, that any dishwasher manufactured or sold by respondent can completely clean dishes, cookware, and other utensils placed in the dishwasher, without prior scraping, scouring, or rinsing.

5. Representing, directly or by implication, that any dishwasher manufactured or sold by respondent can be randomly loaded or that there are no special instructions to follow when loading.

PART II

It is further ordered, That respondent, its successors and assigns, either jointly or individually, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, distribution or sale of major home appliances in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Making any statements or representations, directly or by implication, concerning the performance of such products unless at the time that the statements or representations are made respondents possess and rely on a reasonable basis for such statements or representations, which shall consist of competent and reliable scientific test, as defined in Paragraph One (b) hereafter.

(b) For purposes of this order a "competent and reliable scientific test" is one in which one or more persons with education, knowledge, and experience in the field conduct a test and evaluate its results in an objective manner using testing, evaluation, and analysis procedures generally accepted in the profession and which best insure valid and reliable results. Moreover, the test results must either accurately predict, or be correlated with, the results that a consumer ordinarily would obtain using the product under normal household conditions.

2. Failing to make a "clear and conspicuous disclosure" (as that

term is defined in the FTC's Statement of Enforcement Policy of October 21, 1970) that product features, depicted or described in advertising for a product, are not applicable to certain models. Such disclosure shall include the model number (and name of the model if applicable) and the product features which do not apply to such model(s).

3. Making any statements or representations, directly or by implication, in connection with the advertisement of any such product which are inconsistent in any material respect with any statements or representations contained directly or by implication in post purchase material(s) supplied to the purchaser of such products.

4. For purposes of this order the term "major home appliances" means the following applicances presently manufactured or sold by the respondent: automatic dishwashers; garbage disposers; trash compactors; and microwave ovens.

PART III

It is further ordered, That respondent, its successors and assigns, either jointly or individually, and their officers, representatives, and agents and employees; directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, distribution or sale of "major home appliances" in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) documentation in support of and on which respondent relied in making any claim included in advertising, sales promotional material, or post purchase materials, disseminated by respondents or by any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, concerning the performance characteristics of any of Respondent's major home appliances;

(b) documentation which contradicts, qualifies or calls into serious question any claim included in advertising, sales promotional material or post purchase materials disseminated by respondents or by any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, concerning the performance characteristics of any respondent's major home appliances.

Such documentation shall be retained by respondent for a period of

three years from the date such advertising, sales promotional, or post purchase materials were last disseminated.

PART IV

It is further ordered, That respondent notify the Commission at least 30 days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its officers, agents, representatives or employees of the respondent's Thermador/Waste King division who are engaged in the preparation, placement, or review of advertisements for the "major home appliances" defined in this order.

It is further ordered, That the respondent shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

277-685 O—79——65

ADVISORY OPINIONS

Proposed course of action by gerontology research foundation does not qualify for Non-Profit Institutions Act exemption to the Robinson-Patman Act. [*File No. 783 7007, Foundation for Later Life Enrichment Fund, July 19, 1978*]

Advisory Opinion Letter

July 19, 1978

Dear Mr. Helfand:

This is in response to your letter of November 7, 1977, requesting advice concerning the exemption to the Robinson-Patman Act provided by the Non-Profit Institutions Act, 52 Stat. 446, 15 U.S.C. § 13c.

The Commission understands that the Foundation for Later Life Enrichment is a not-for-profit, non-private foundation, under Section 509(a)(2) of the Internal Revenue Code. The Foundation was created to fund gerontology research. You have advised that, in this connection, it intends to provide high quality goods and services to the aged at low cost.

Certain manufacturers reportedly have agreed to donate products; others will sell to the Foundation at wholesale prices. Your question is whether manufacturers, under the Non-Profit Institutions Act's exemption, may sell products to the Foundation for resale at prices below wholesale, making the difference in price a donation to the Foundation.

The Non-Profit Institutions Act exempts from the requirements of the Robinson-Patman Act "purchases of their supplies for their own use * * * by charitable institutions not operated for profit." Assuming, but without need to decide, that a gerontology research foundation would come within the class of institutions covered by the Non-Profit Institutions Act, the issue presented is whether the purchase and resale transactions here proposed would constitute purchases of supplies for its "own use" by the institution in question. The Commission has concluded that they would not.

In *Abbott Laboratories* v. *Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1 (1976), the Supreme Court construed the language "for their own use", when applied to hospitals, to mean "use" that is part of and promotes the intended institutional operation of the hospital in the care of persons who are its patients. The dispensation or sale of

drugs to patients under the hospital's care, or to persons essential to the hospital's function, were deemed to be for the hospital's "own use". Prescription sales by the hospital to classes of persons such as *former* patients or *walk-in* buyers, on the other hand, were deemed *not* to be within the exemption. As the Court explained:

> * * * such sales would make the commercially advantaged hospital pharmacy just another community drug store open to all comers for prescription services and devastatingly positioned with respect to commercial pharmacies. This would extend the hospital's own use concept beyond that contemplated by Congress in 13c. [425 U.S. pp. 17–18.]

The Commission does not view the purchase of products for resale to the elderly as in any manner a function integral to the operation, institutionally, of a gerontological research foundation. The question that is presented is not with respect to the status of gifts or contributions nor does it deal with the status of supplies purchased for consumption or use by the Foundation itself or its staff. Although the proposed purchase and resale activity may accrue to the Foundation's benefit and the proceeds therefrom utilized for its general purposes, that is not enough. The exemption applies only to purchases by a charitable institution not operated for profit, when such purchases are for the institution's "own use".

The Commission, in this regard, notes the statement by Justice Marshall, in his concurring opinion in *Abbott,* respecting the Congressional intent:

> * * * Congress was primarily interested in directly aiding nonprofit institutions by lowering their operating expenses, but not interested in indirectly aiding such institutions by providing them with the means of raising additional money - particularly when such resales of supplies would put the institution in competition with retail business not eligible for exemption * * *. [425 U.S. pp. 22–23.]

The Commission, accordingly, does not regard the purchase of products at prices below wholesale, by the Foundation for Later Life Enrichment, for resale at retail to the elderly, exempt from the requirements of the Robinson-Patman Act. The Non-Profit Institution's exemption is limited to purchases of supplies, by covered institutions, for their own use.

By direction of the Commission.

Letter of Request

November 7, 1977

Dear Sir:

I am serving as the Director of the Foundation for Later Life Enrichment. We were designated a non-profit, non-private founda-

tion by the Internal Revenue Service under Section 509(a)(2) of the Internal Revenue Code on January 26, 1977. In addition to funding gerontology research, we were created to provide high quality goods and services to the aged at low cost.

So far, several manufacturers have agreed to donate products to us, and a number have agreed to sell products to us at wholesale prices. However, a question has arisen about the possibility of manufacturers selling goods to us at prices below wholesale and making the difference in price a donation to the Foundation. We are not clear about whether or not this constitutes a violation of the Robinson-Pattman Act, in view of the fact that we are recognized as a non-profit foundation, and may be exempt under Section 5 of the Federal Trade Commission Regulations.

On Monday, October 31, 1977, I discussed this with David Paul and Alan Rubinstein in your New York office. They recommended I write requesting an Advisory Opinion from your office. Could you please clarify our status in regard to these apparently conflicting regulations?

Thanking you in advance for your assistance in this matter, I remain

Yours truly,
/s/ Stephen Helfand

Cigarette companies advertising, without health warning disclosure, via recorded telephonic advertising messages, provided no interstate calls are involved held illegal. [*File No. 783 7010, Fonawin Corporation, August 18, 1978*]

Advisory Opinion Letter

August 18, 1978

Dear Mr. Schaftel:

The Commission has decided that consideration of the course of action you have proposed is appropriate. Your proposal raises the question, in substance, whether cigarette companies may legally advertise, without a health warning disclosure,* via recorded telephonic advertising messages, provided no interstate calls are involved. The Commission's conclusion is that they may not.

The Commission understands that your company, Fonawin Corporation, under an exclusive contract with the Offtrack Betting Corporation of New York (OTB) operates a recorded telephone answering service (60 second recorded announcements) that provides horse racing results. The announcement service is supported by commercial advertising messages included within such recordings.

Technology reportedly exists to separate out the non-toll intrastate aspect of this service, so that no interstate calls would receive cigarette advertising messages and thus the Federal Communications Commission has advised your client that this activity is not within its jurisdiction. You advise that, for the most part, persons calling the service are "bettors." Because persons under 18 are not eligible to place bets with OTB, you urge that the proposed cigarette advertising would have little, if any exposure to children.

It is the Commission's opinion that the proposed advertising would be within the jurisdictional reach of the Federal Trade Commission Act. By advertising cigarettes to the public and failing to disclose that cigarette smoking is dangerous to health, the cigarette manufacturer-advertisers would be representing thereby, directly or by implication, that cigarettes are not dangerous to health. Although this activity is not covered by the Commission's order in *Lorillard, et al.*, 80 F.T.C. 455 (1972), the principles articulated in those orders apply here. A failure or refusal to make such disclosure in the proposed advertising would, in the Commission's view, violate

* "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health."

Section 5 of that Act which declares that unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce are unlawful.

By direction of the Commission.

Fourth Letter of Request

May 15, 1978

Dear Mr. Chairman:

More than a year ago I asked your commission for a ruling on the following subject:

I requested that cigarette companies be allowed to advertise their product without the warning disclosures on my telephone line that gives the New York race results. No one under eighteen years of age is allowed to bet by the Offtrack Betting Corporation of New York with whom I have an exclusive contract.

I have gone months without hearing from your Bureau of Consumer Protection, and then have received sporadic letters from them, the last on January 24, 1978 from Russell Hatchl stating "My superior in the Bureau of Consumer Protection determined that a formal commission opinion is inappropriate, because issues of cigarette advertising are pending in the courts."

When might I expect to get a definitive opinion from you?

Sincerely yours,

/s/ Stuart Scheftel

Fourth Staff Response

January 24, 1978

Dear Mr. Scheftel:

This is in response to your January 19, 1978 letter. You had noted receipt of my November 9, 1977 letter to you which gave my opinion on the subject of warning disclosures in cigarette advertisements included in one minute recorded telephone announcements of horse racing results. You then repeated your request for an opinion on the subject by the Commission itself.

Since my November 9 letter, my superiors in the Bureau of Consumer Protection determined that a formal Commission opinion is inappropriate because issues of cigarette advertising are pending in the courts. This decision was communicated to you in the November 21, 1977 letter from Tracy Westen, Deputy Director,

Bureau of Consumer Protection. A copy of that letter is enclosed for your information.

Sincerely,
/s/ Russell Hatchl
Russell Hatchl
Attorney

Third Letter of Request

January 19, 1978

Dear Mr. Hatchl:

As you know, I have been asking for Commission ruling on the subject of including cigarette advertising with our one minute recorded telephone announcements for horse racing results.

I have your negative staff opinion of November 9, but what I want is a definite Commission opinion, particularly in view of the fact that the staff opinion was based on the Lorillard decision, 80 F.T.C. 455 (1972), in which you correctly stated "does not cover your (our) proposed activities."

I do think that as I first asked for a Commission opinion on May 20, 1977 there has now been ample time for me to have received a ruling from the Commission.

Sincerely yours,
/s/ Stuart Scheftel
Stuart Scheftel
President

Third Staff Response

November 21, 1977

Dear Mr. Scheftel:

This is in response to your June 3, 1977 request for an advisory opinion concerning your proposal to include cigarette advertisements in one minute recorded announcements of horse racing results. Because issues of cigarette advertising are pending in the courts, a formal Commission opinion is inappropriate. I am therefore responding on behalf of the Bureau of Consumer Protection.

The current Commission view of what should be disclosed in cigarette advertisements is contained in *Lorillard et al,* 80 F.T.C. 455 (1972), a copy of which is enclosed. In *Lorillard,* the Commission ordered the six major cigarette companies to make a clear and conspicuous disclosure of the following statement: "Warning: The

Surgeon General Has Determined that Cigarette Smoking is Dangerous to Your Health." This remedy was designed to insure that each time consumers were confronted with a cigarette advertisement they were warned about the grave health risks involved in smoking. While *Lorillard* by its terms does not cover your proposed activities, the Commission's power to prohibit "unfair or deceptive acts or practices in or affecting commerce" does.

Therefore, each of the cigarette advertisements which you propose to run should include the above warning statement. For the medium involved, a clear and conspicuous disclosure should, of course, be in the same language, *e.g.,* English or Spanish, as the advertisement. It should be transmitted at the same apparent loudness as the advertisement and its impact should not be diluted by competing background noises. It should appear at the end of the particular advertisement to which it applies.

Please be advised that the foregoing represents staff views. It is not a formal Commission advisory opinion, and, accordingly, is not binding on the Commission. If you have further questions concerning the foregoing, please do not hesitate to call me. My number is (202) 523-3541.

Sincerely,
/s/ Tracy A. Westen
Tracy A. Westen
Deputy Director

Second Staff Response

November 9, 1977

Dear Mr. Scheftel:

This will supplement my November 8, 1977, letter to you on the subject of the cigarette advertisements your company is considering including in one minute recorded telephone announcements of horse racing results. You had asked that I provide you with the specifics of the opinion I have on your proposal and which I would have given on May 29, 1977, when we first spoke on this subject, if you had sought a *staff* opinion instead of a *Commission* opinion.

The current Commission view of what should be disclosed in cigarette advertisements is contained in *Lorillard, et al.,* 80 F.T.C. 455 (1972), a copy of which is enclosed. In *Lorillard,* the Commission ordered the six major cigarette companies to make a clear and conspicuous disclosure of the following statement: "Warning: The Surgeon General Has Determined that Cigarette Smoking Is

Dangerous to Your Health." This remedy was designed to insure that each time consumers were confronted with a cigarette advertisement they were warned about the grave health risks involved in smoking. While *Lorillard* by its terms does not cover your proposed activities, the Commission's power to prohibit "unfair or deceptive acts or practices in or affecting commerce" does.

Therefore, each of the cigarette advertisements which you propose to run should include the above warning statement. For the medium involved, a clear and conspicuous disclosure should, of course, be in the same language, e.g., Spanish, as the advertisement. It should be transmitted at the same apparent loudness as the advertisement. Its impact should not be diluted by competing background noises. It could appear at the end of the particular advertisement to which it applies.

Sincerely,
/s/ Russell Hatchl
Russell Hatchl
Attorney

First Staff Response

November 8, 1977

Dear Mr. Scheftel:

We owe you an apology for the delay which has occurred in handling your request for an advisory opinion for the telephone cigarette advertising your company is contemplating. Although a draft response to your inquiry was prepared by me and reviewed by our General Counsel's office back in July, the matter apparently became misplaced before the office of the Director of the Bureau of Consumer Protection reviewed it. We apologize for this.

I can assure you that this matter is now receiving the proper attention, and although I cannot promise an advisory opinion by any specific date, I am confident that the delays which occurred in the past will not recur.

Sincerely,
/s/ Russell Hatchl
Russell Hatchl
Attorney

Second Letter of Request

November 2, 1977

Dear Chairman Pertschuk:

Several months ago I wrote to you seeking a conference with your agency concerning legal requirements under the jurisdiction of your

agency applicable to possible cigarette advertising on my company's telephone announcement service. You did not reply. Rather, an FTC staff member, Dolores Montgomery, contacted me to suggest that I convert my letter into a request for Advisory Opinion. This was done, the request being filed under date of June 3, 1977 (Case No. 26718666). Hearing nothing for three months I inquired by letter to Ms. Montgomery in September. No reply.

Approximately two weeks ago I contacted Ms. Montgomery by telephone, who referred me to Murray Francis Slagel of your staff to whom I spoke on the telephone. I was assured I would receive a response to my request within the next day or two. To date, I have not received even the courtesy of a return call or letter.

It is now approximately six months since my first contact with you. I have no answer to what must surely be a rather simple question, and it now appears that I am getting a "run-around" from FTC staff.

I am sure the FTC staff thinks it is working on important public business, and after all my inquiry only affects (in however vital a way) one small private business. But surely I am entitled to some answer to my request (the agency's rules so indicated)– and within a reasonable time. As I recall, President Carter said something about bureaucratic responsiveness (or lack thereof) in his campaign.

Let me reiterate that what I seek is the advice which I was led to believe your agency is both authorized and required by law to give. While my problem may be of little moment in Washington, the present uncertainty is very damaging to my business.

Very truly yours,
FONAWIN CORPORATION
By /s/ Stuart Scheftel
Stuart Scheftel
President

Letter of Request

June 3, 1977

Dear Sir:

The purpose of this letter is to request, on behalf of Fonawin Corporation (Fonawin), an Advisory Opinion pursuant to Subpart A, Part 1, of the Commission's Procedures and Rules of Practice.

Fonawin is engaged in the business of providing one-minute

recorded announcements of horse racing results as received from tracks where New York City's Offtrack Betting Corporation (OTB) handles races.

This Corporation with which our company has an exclusive contract is controlled by the State of New York and returns approximately One hundred million dollars a year to State, City and Local funds.

It provides this service to any person calling a certain New York City telephone number (999-2121), utilizing the New York Telephone Company 9A Multi-Customer Announcement Service (which has the technical capacity to accomodate simultaneously up to 3300 incoming telephone calls on a single line). Fonawin's recorded racing information service is supported by the sale of advertising messages, which are incorporated into the recorded 60-second announcements.

Under date of July 28, 1976, the Federal Communications Commission issued a declaratory ruling concerning the applicability of Section 6 of the Public Health Cigarette Smoking Act of 1969 (15 U.S.C. § 1335) to the carriage of cigarette advertising in connection with the non-toll intrastate aspect of Fonawin's service; a copy of that ruling is attached hereto. More particularly, Fonawin advised the FCC that it had become technically feasible to separate the non-toll intrastate aspect of its service (*i.e.,* local calls made in the 212 Numbering Plan Area) from other calls, and sought guidance whether, under these circumstances, the carriage of cigarette advertising in the non-toll intrastate aspect only was prohibited. The FCC's ruling was to the effect that Section 6 of the Cigarette Smoking Act of 1969 does not preclude the carriage of cigarette advertising in the limited circumstance of the non-toll intrastate aspect of Fonawin's service.

Notwithstanding the FCC ruling, there remains a question whether any statutory or regulatory requirement within the general jurisdiction of the Federal Trade Commission would affect the carriage of such cigarette advertising. Specifically, an Advisory Opinion is sought as to whether such cigarette advertising would have to carry some form of warning to the effect that cigarette smoking may be harmful to the smoker's health.

At present, Fonawin is not carrying and has not sold any cigarette advertising and, indeed, has not separated the non-toll intrastate aspect of its service. Before pursuing such separation and before pursuing further the sale of cigarette advertising, it seeks Commission guidance with respect to the warning subject. This is because Fonawin has reason to believe that a warning requirement, if applicable, would discourage cigarette companies from advertising

on Fonawin's service (owing, apparently, to the brevity of the advertisement and its oral form). Consequently, an Advisory Opinion is sought in order that Fonawin can decide whether to proceed to separate the non-toll intrastate aspect of its service and to pursue further the sale of cigarette advertising.

So far as Fonawin is aware, the matter raised by this request for Advisory Opinion is not the subject of any current proceeding or ruling by this Commission, or any other agency or government.

There is one additional matter which may be of interest to the Commission. Fonawin is under the impression that, for the most part, persons calling its service are OTB bettors (the Fonawin number is conspicuously posted in the OTB betting parlors). Persons under 18 years of age are not eligible to place bets with OTB. Consequently, it is to be presumed that such cigarette advertising as may be carried on the non-toll intrastate aspect of Fonawin's service will have little, if any, exposure to children.

Should the Commission desire additional information with respect to Fonawin's service, or should the Commission consider a conference useful, Fonawin is prepared to cooperate fully. Contact can be made to Fonawin's President: Mr. Stuart Scheftel, 4 West 58th Street, New York, New York; telephone number (212) Plaza 9-2929.

Very truly yours,
FONAWIN CORPORATION
by /s/ Stuart Scheftel
Stuart Scheftel
President

Initial Contact Letter

April 28, 1977

Dear Chairman Pertschuk:

I am writing to request an opportunity to meet with you, or your representative, concerning a matter of importance to Fonawin Corporation, of which I am the major stockholder.

Fonawin is engaged in the business of operating a telephone announcement service in New York City. A person calling Fonawin's number receives a recorded announcement containing late horse racing results on races for which New York City's Offtrack Betting Corporation offers wagering. This service has been developed in conjunction with OTB, a corporation of the City of New York, and the Fonawin number is posted in the various OTB betting parlors.

Fonawin realizes revenues by carrying a brief advertising message as part of each recorded announcement.

In July 1976, the Federal Communications Commission issued a declaratory ruling that the carriage of cigarette advertising in connection with the non-toll, intrastate aspect of Fonawin's announcement service would not contravene Section 6 of the Public Health Cigarette Smoking Act of 1969. A copy of the FCC's ruling is attached.

While the FCC ruling has cleared the way for cigarette advertising in connection with Fonawin's purely local announcement service, it does not address the question of whether there are any related requirements in connection with such advertising which may arise from statute, rule or policy under jurisdiction of the Federal Trade Commission. Specifically, I have reference to the so-called "warning statement" to the effect that cigarette smoking may be harmful to health.

In soliciting advertising business from cigarette companies, Fonawin has noted certain uncertainty as to what your Commission would require with respect to Fonawin's carriage of cigarette advertisements. Fonawin's objective is to comply with all applicable legal requirements; at the same time, we hope to avoid having our business disrupted by uncertainty as to applicable government requirements. Accordingly, I seek a meeting in order that this matter may be clarified.

Your office may contact me at the above number with respect to a mutually convenient time for a meeting in the offices of the Commission. I shall endeavor to make myself available at your convenience.

Very truly yours,
/s/ Stuart Scheftel

P.S. Fonawin also operates the Weather Service for the entire New York Long Island and Westchester areas for the New York Telephone Company. However, this Fonawin Service does not accept advertising.

/s/ S.S.

Legality of use of mathematical model to forecast gross volume of shipments within furniture industry. [*File No. 783 7011, Business and Institutional Furniture Manufacturers Association, September 19, 1978*]

Advisory Opinion Letter

September 19, 1978

Dear Mr. Johnson:

This responds to your request for an advisory opinion on the use, by the Business and Institutional Furniture Manufacturers Association (BIFMA), of a model to forecast gross volume of shipments in the industry.

The Commission undertstands that BIFMA is a trade association with membership open to all firms in the industry upon payment of annual dues graduated according to firm size, and that current membership accounts for about 75% of industry sales. The Commission further understands that BIFMA proposes to engage an independent accounting firm to use a mathematical model, based entirely on publicly available economic indicators, attempting to forecast total quarterly office furniture shipments (*i.e.*, forecasts will not be broken down by office furniture type or product category) for the ensuing twelve-month period. There will be no exchange or disclosure whatever of individual firm data. It is proposed that access to the forecast shipment data be limited to members of BIFMA.

Shipment forecast arrangements by competitiors in particular marketing environments could raise serious antitrust concerns. On the basis of available information indicating low industry concentration and the presence of differentiated products, however, the Commission is of the view that the likelihood of anticompetitive use of the proposed forecast data is remote. The Commission cautions that the forecasts must not be used by the Association or its members so as to restrict independent business decisions by any individual firm, to secure adherence to quotas of production or sales, or to effect any other such unlawful trade restraint.

Accordingly, the Commission does not presently object to the proposed forecast of total shipments, subject to the above qualifications.

By direction of the Commission.

Letter of Request

May 10, 1977

Dear Mr. Secretary:

We are general counsel for the Business and Institutional Furniture Manufacturers' Association (BIFMA) and in that connection we are submitting this request for an advisory opinion with respect to a proposed sales forecasting program. The proposed program is not currently under investigation by or the subject of any proceedings before the Commission. The program is scheduled for implementation in June of 1977. However, we are authorized to represent to the Commission that the program will not be instituted until we have received the requested opinion.

Background

BIFMA is a Michigan nonprofit corporation which was formally organized in June of 1973. Copies of the association's Articles of Incorporation and Bylaws are enclosed as Exhibits A and B.* The association was organized for the benefit of members of the industry and the public, particularly in the areas of development and standardization of test methods and procedures, statistical compilation and reporting, and the development of material standards.

Enclosed for your information as Exhibit C* is a current copy of the membershio list of BIFMA. It is estimated that current members account for over 75% of the national sales of the office furniture industry.

Under Article II, Section 1, of the corporation's Bylaws, membership in the association is open to all manufacturers of business and institutional furniture. The association encourages manufacturers to become members and is currently campaigning to increase its membership. The annual dues for membership are graduated according to the size of the manufacturer in terms of annual sales volume, and are set forth in the following table:

Annual Sales Volume	*Annual Membership Dues*
Under $1 million	$ 540
$1 to $4.9 million	1,020
$5 to $9.9 million	1,500
$10 to $14.9 million	2,100
$15 to $24.9 million	2,700
$25 to $49.9 million	3,300
Over $50 million	4,200

* Not reproduced herein.

As an example of BIFMA's activity, the association has developed standards for office chairs which have been accepted and published by the American National Standards Institute. BIFMA is actively pursuing similar standards with respect to the manufacture of other items of office furniture.

As an additional activity, BIFMA is sponsoring the collection, compilation and periodic reporting of industry new orders, shipments, unfilled orders and inventories as well as net sales, days' accounts receivable are outstanding and inventory turnover information. Membership data is reported to Seidman & Seidman, certified public accountants, who are responsible for the compilation and reporting of the statistics. No other persons have access to the data of individual firms, and the reports contain no reference to individual firm data. Seidman & Seidman computes the arithmetic averages of the data in each category submitted by members and reports to each member that firm's individual data and the arithmetic average of data for all reporting firms and for all reporting firms by three sales size categories (A - up to $10,000,000; B - $10,000,000 to $40,000,000; and C - over $40,000,000). No individual firm receives any data of or comparison with any other individual firm.

Proposed Course of Action

We are enclosing herewith, marked as Exhibit D,* a document entitled "BIFMA Forecasting Research Program - A Consolidated Report." This document sets forth the research that has been done by BIFMA and its consultants with regard to the development of a forecasting model to forecast office furniture shipments. At page 25 of this document, the forecasting model is set forth. BIFMA proposes to engage Seidman & Seidman to utilize this forecasting model and prepare on a quarterly basis a forecast of total office furniture shipments for the next twelve month period showing projected gross shipments on a calendar quarter basis during that twelve month period.

It is proposed that Seidman & Seidman will distribute the quarterly forecasts of office furniture shipments only to members and associate members of the association. This limitation is predicated upon the fact that all manufacturers in the business and institutional furniture industry are encouraged to become members,

* Not reproduced herein.

there are no conditions of membership which would operate as a barrier to exclude any manufacturer, and upon the fact that the association has expended considerable amounts of money in developing the program and will expend considerable amounts of money in the future toward the production of the forecasts and further developments and refinements in the program which would be difficiult if not impossible to allocate on a basis which would result in a fair sharing of these costs by members and nonmembers of the association.

Request for Advisory Opinion

We respectfully request that the Commission render its advisory opinion with respect to the legality of the above proposed course of action. In order to expedite this matter, we would be happy to supply any explanation or additional information to members of your staff at their convenience. In this regard, your staff should feel free to telephone the undersigned on a collect basis at any time.

Thank you for your consideration.

Very truly yours,
VARNUM, RIDDERING, WIERENGO
& CHRISTENSON
/s/ Donald L. Johnson

Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved. [*File No. 773 7016, Lorillard, September 26, 1978*]

Advisory Opinion Letter

September 26, 1978

Dear Mr. Gastman:

This is in response to your request for an advisory opinion as to whether Lorillard may disseminate cigarette advertisements headlining, without qualification, a tar value higher than the latest published FTC number.

The Commission understands that your request was transmitted orally to a Commission staff attorney. Although requests for advice should be submitted in writing to the Secretary of the Commission, §1.2 of the Commission's Rules of Practice, the Commission has determined to render an advisory opinion because it has sufficient information regarding the proposed course of action.

Under the agreement submitted to the Commission by Lorillard and seven other cigarette companies, dated December 17, 1970, cigarette advertisements must include tar and nicotine data from Commission test results most recently published in the Federal Register, subject to certain specified exceptions necessary to meet deadlines for submission of advertising copy. Lorillard's proposed advertisements would deviate from this industry agreement, by permitting cigarette advertisements to feature a tar number greater than the latest FTC tar number for an indeterminate length of time.

The Commission cannot give its approval to Lorillard's proposed advertising plan. In the Commission's view, it would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure. If the headlined tar level differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated. At the same time, the Commission could not condone the practice of utilizing a higher headlined tar figure in the voluntary disclosure and labelling the figures "By FTC Method," since the figures would not actually be the result of the FTC method.

Therefore, in the Commission's opinion, tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number.

By direction of the Commission.

When needed pharmaceuticals are unavailable or difficult to obtain, non-profit hospital may resell the needed pharmaceuticals to the general public as humanitarian gesture during emergency caused by medicaid strike. [*File No. 773 7009, St. Peter's Hospital of the City of Albany, September 27, 1978*]

*Revised Opinion Letter**

September 27, 1978

Dear Mr. Iseman:

This is in response to your letter of December 20, 1976, requesting advice concerning the exemption to the Robinson-Patman Act found in the Non-Profit Institutions Act, 52 Stat. 446, 15 U.S.C. Sec. 13c.

The Commission understands that your client, St. Peter's Hospital of the City of Albany, is a not-for-profit corporation currently receiving preferential price treatment in its purchase of pharmaceuticals as permitted by the above-cited exemption of the Robinson-Patman Act; that your client would like to resell pharmaceuticals, at the same reduced price it pays its supplier, to a neighboring, not-for-profit nursing home which currently purchases its drug needs at retail from local druggists; and that your client would like to resell pharmaceuticals to the general public during the medicaid strike, should pharmaceuticals become otherwise difficult or impossible to obtain. You seek advice on whether such resales are permissible under the Robinson-Patman Act.

The Non-Profit Institutions Act exempts from the Robinson-Patman Act "purchases of their supplies for their own use by * * * hospitals, and charitable institutions not operated for profit." The Supreme Court in *Abbott Laboratories* v. *Portland Retail Druggists Ass'n, Inc.*, 426 U.S. 1 (1976), held that the phrase "for their own use" limited the classes of individuals to whom the supplies could be resold. However, the Commission does not believe these limitations were intended to apply to resales of supplies, at cost, by one charitable institution to another that are limited, in turn, to the latter charitable institution's own use. A resale of this nature would constitute a not-for-profit transfer of supplies from one institution, eligible under the exemption, to another such institution, also eligible under the exemption. In the Commission's view, the exemption was intended to insulate from Robinson-Patman applica-

* For the original Advisory Opinion Letter and the Letter of Request, *see* 89 F.T.C. 689.

tion all purchases of supplies (for their own use) by the designated classes of institutions not operated for profit. The transactions, as above described, would not appear in conflict with such a purpose. The Commission, accordingly, would regard the resale, of pharmaceuticals by your client to the nursing home at the same reduced price that it paid its supplier as not altering its exempt status under the Non-Profit Institutions Act. Such pharmaceuticals must be acquired for the nursing home's "own use" as that language was interpreted in *Abbott Laboratories, supra,* for the exemption to apply.

The question of whether a non-profit hospital such as your client may open its pharmacy to the general public in an emergency situation was addressed specifically by the Supreme Court in the *Abbott Laboratories* case. We direct your attention to that portion of the decision which states that:

> [W]hen the hospital pharmacy is the only one available in the community to meet a particular emergency situation[,] * * * [s]o long as the hospital pharmacy holds [that] situation within bounds, and entertains it only as a humanitarian gesture, we shall not condemn the hospital and its suppliers to a Robinson-Patman violation * * *

[*Id.* at 18.]

Accordingly, the Commission is of the opinion that if needed pharmaceuticals are not available or difficult to obtain, your client may resell the needed pharmaceuticals to the general public as a humanitarian gesture during the emergency caused by the medicaid strike.

By direction of the Commission. Commissioner Pitofsky did not participate.

Proposed price reporting service for retail chain food manufacturers. [*File No. 783 7002, Mathews Research, September 29, 1978*]

Advisory Opinion Letter

September 29, 1978

Dear Dr. Mathews:

This is in response to your request for advice concerning a proposed price reporting service for retail chain food merchandisers, styled Full Range Market Monitor.

Your proposal contemplates that participating supermarket chains would furnish your firm, on a weekly basis, computer printouts listing all of the items sold in their stores together with the current selling price of each item. The prices supplied would be effective as of the date submitted but with no guarantee as to the length of time those prices would remain the same. This price information would be collated for release by your firm the third day after receipt. You have advised that the major chains in your area have indicated interest but are unwilling to provide price lists without a Commission opinion respecting possible law violation.

It is proposed, as the Commission understands, that the price survey data would be available, not only to the participating food retailers, but to anyone willing to use the service at the established rates. This would include food and grocery manufacturers and suppliers, government, public service groups and individuals. Some purchasers of this information, such as manufacturers, might only wish to purchase the retail price data pertaining to their own product group or to obtain a partial report. Such purchasers, in addition, might not need the retail price information so promptly. However, you have indicated that participating retailers will need the reports promptly enough to enable timely price adjustments or permit contemporaneous questioning of suppliers concerning why a lower priced chain was able to obtain a supplier's product for less.

You have also inquired concerning the legal effect of particular variations in the proposed service. Two involved alternative methods of identifying the participating stores, by name or letter code; two related to limiting price survey data to only the participating retail chains; and one variation proposed the purchase of price data with a sale of the collated data back to the participating chains. None of

these variations would serve to alter the Commission's basic concern with respect to the subject proposal.

Retail grocery price surveys which make available to consumers competitive price information, enabling them to better formulate purchasing decisions, are, in the Commission's view, of benefit to consumers and of benefit to retail level price competition. The Commission has no objection to such surveys. Nor would the Commission's concern here be the same if the subject survey was limited to observed prices. However, your proposal goes beyond this by providing for the exchange of current weekly pricing schedules among competing retail grocery chains. Although the prices reported are subject to change at any time, they do reflect areawide pricing decisions by each chain involved in the program. Access to such information over time might well enable a chain to anticipate the pricing patterns of its competitors and facilitate the coordination of future pricing decisions. Particularly in highly concentrated local markets (such as the Youngstown/Warren, Ohio market proposed by you as a test market) the danger that price stabilization would result is sufficiently great that the Commission is unable to approve the subject proposal as presented.

By direction of the Commission.

Second Letter of Request

January 17, 1977

Dear Ms. Cotter:

Shortly after your letter of March 11, 1976, arrived John Wilcox moved. We recently discovered that the answers to your questions were not sent to you, so that you could proceed with the advisory opinion of the Market Monitor service. The following are the details addressed in each question and numbered accordingly. (I have also enclosed a copy of your letter.)

1. Price information is to be collected weekly and is to be published weekly on the third day after the information is received by Mathews Research.

2. Prices are effective as of the date they are submitted to us by the store operator. There is no guarantee as to the length of time the prices will remain the same.

3. A sample page from the Market Monitor report is enclosed.*

4. All clients will receive the same information; it will be available to anyone willing to use the service at the established rates. Food manufacturers may only wish to purchase information that pertains to their product group, or only require a partial report.

5. The retailers participating in this project will be from the divisional (or regional) levels. Our first test is to work with the chains that have stores located in the Youngstown/Warren SMSA. The divisions are located in Youngstown; Sharon, Pennsylvania; Cleveland, Ohio; and Pittsburgh, Pennsylvania. The prices and product lists will only be reported for the Youngstown/Warren SMSA. If the test is successful we would like to expand the service to other areas.

6. If the Youngstown/Warren SMSA test is successful, Mathews Research intends to expand the service into other areas located in Ohio, Pennsylvania, Western New York, Michagan, Indiana, and Illinois. Our resources are limited, and slow growth is anticipated.

7. Each grocery division has a computer print-out of all products, sizes and prices the company stocks. Each store manager prices his stock according to this list. The computer print-outs of all products, sizes and prices each division carries will be received by Mathews Research. We have not been able to obtain copies of the print-outs but have enclosed a copy of one that has wholesale prices.

8. As far as we understand, the Youngstown/Warren SMSA is a one price zone. Consequently, we will only be furnished one price for each product.

9. The information will enable retailers to be competitive in their markets. For example, if a price in one chain is lower than another the higher price chain would question the manufacturer as to why the lower priced chain was able to obtain the product for less. Moreover, the higher priced chain would question their pricing structure and if too high might lower their prices, thus enabling slightly more competition in a market area. If the report were not timely they would not be able to adjust their prices and if a manufacturer were offering discounts within a given time period they would not be able to take advantage of the lower discount rate.

* Not reproduced herein.

Product manufacturers would be able to use the information to analyze why a product is doing well or poorly in a market. For example, the retail price is higher in one market or not stocked in a market: this could explain why the product is not doing well in that area. It is not essential that the product manufacturers receive the Market Monitor as quickly as grocers, but to offer data more than two months old would weaken the value of our service; they could obtain this information in that length of time from their salesmen and other research services.

10. Representatives of food stores have indicated to us that the information available through the Market Monitor would be more reliable than traditional methods of collecting data, and at a lower cost to them.

11. A vice president of a food store chain indicated to us that we should propose the consolidation of pricing lists from several chains. He knows this is being done in California and those who participate are finding it useful. It gives them a complete list of store items at a lower cost.

We asked the major chains operating in this area and they have indicated their interest, and would be willing to give us their price lists. Before they proceed they want an opinion from the F.T.C. to insure they are not in violation of your regulations. Moreover, Mathews Research would not wish to provide a service that would be an embarrassment to our clients at a later date.

I certainly appreciate your interest and help in this matter. If I can provide any additional information please let me know.

Sincerely,
/s/ Donald H. Mathews
Donald H. Mathews, Ph.D.
MATHEWS RESEARCH

Staff Letter of Response

March 11, 1976

Dear Mr. Wilcox:

We are in receipt of your letter of February 16 requesting an advisory opinion relating to a proposed marketing research service, the "Full Range Market Monitor."

The matter you raise appears to satisfy the requirements of Section 1.1 of the Commission's Rules of Practice. The staff intends

to submit this matter of the Commission for issuance of an advisory opinion. However, the final decision as to whether to issue an opinion is made by the Commission in the course of its substantive consideration of the issues. I, of course, cannot inform you what action the Commission will ultimately take.

The legality of the plan is dependent on factual assessments of the market involved, the parameters of the plan and its probable effect on price competition. To respond to your inquiry, the following supplementary information is needed:

1) State how often price information will be collected (weekly, twice a month, monthly, every other month) and how often the Market Monitor reports will be published. How soon after the price information is obtained will the Market Monitor report be available?

2) Identify the effective dates of the prices reported: whether the reported prices will be effective on a specified date in the future; whether they are effective presently and will remain in effect during some or all of the reporting period; whether they are the most recently effective, current prices; or whether some other kind of price information is to be reported.

3) Submit a sample of each Market Monitor report as to which an opinion is desired.

4) For each report form provided in response to Item 3, identify all potential purchasers that have indicated an interest in purchasing such report (specifying whether retailer or product supplier) and indicate whether the report will be available to anyone willing to purchase it.

5) For each report form identified in response to Item 3, identify or describe in detail the retailers or classes of retailers that will participate or will be asked to participate, by providing price information.

6) Describe the geographical areas to be covered by the above reports.

7) Submit a sample of each type of inquiry form that will be used to collect price information from retailers, together with any explanatory material which would accompany or describe the price data to be so provided.

8) Will participating food store firms provide more than one comprehensive price list for a given report? If so, describe what will be provided.

9) Describe fully and in detail what you as marketer of this information view as the benefit(s) and/or usefulness of the reports identified in Item 3 to participating retail food stores. (In response to this item, specify the extent to which current price information is

needed and the extent to which such benefits and/or usefulness would be diminished if the price information reported were one month old or six months old.)

10) Have representatives of food stores indicated to you their views as to the benefit(s) and/or desirability of the price information which would be available through the Market Monitor? Have product suppliers so indicated their views? If so, describe separately in detail.

11) Have representatives of food store firms indicated to you various facets of this or similar programs which they like or dislike or favor or disfavor? Have product suppliers so indicated? If so, describe in each instance in detail the positions and reasons suggested.

I would anticipate that once the Commission is in receipt of the information necessary for full consideration of this matter, your inquiry would be submitted to the Commission by the staff for issuance of an advisory opinion within 60 days.

Sincerely,
Margaret A. Cotter
Attorney
Office of General Counsel

Letter of Request

February 16, 1976

Dear Sir:

It is the desire of Mathews Research that the Federal Trade Commission issue an Industry Guide in accordance with ¶ 9801 of Volume III, Trade Regulations Reports, Pages 17,562, and 17,563.

Mathews Research, a marketing research firm located in Youngstown, Ohio, desires to provide a new marketing research service, primarily to food merchandisers. The service is to be called the "Full Range Market Monitor". It is a new service which Mathews is not now providing. Furthermore, this proposed service is not the subject of a pending investigation or other proceeding by the Federal Trade Commission or any other government agency.

A complete description of the proposed "Full Range Market Monitor" is attached for your examination. The first section describes the basic reporting system. The second section deals with

several variations of the basic service. Appendix A* shows a typical layout of a report print out.

The advice Mathews seeks is: 1. Is the basic service in violation of Section I of the Sherman Act or Section 5 of the Federal Trade Commission Act? 2. Do any of the five variations noted in section 2 of our proposal change the legality of the proposed basic service?

Mathews Research would appreciate prompt notification of receipt of the request, an indication of whether or not it is the intention of the Commission to issue an advisory opinion on this matter, and an estimate as to the length of time required to process an advisory opinion. A representative of our firm is available for a conference at the pleasure of the Commission.

Very sincerely,
/s/ John P. Wilcox
John P. Wilcox
MATHEWS RESEARCH

PROPOSED NEW "FULL RANGE MARKET MONITOR"

PURPOSE: Mathews Research, an independent marketing research firm will collect, collate, publish and disseminate supermarket prices on the full line of merchandise items sold in supermarkets. The purpose of this service is to provide clients with prompt accurate market information in general and item prices in particular. Mathews Research in this service is a merchandiser of information.

DESCRIPTION OF SERVICE

Section 1. Participating supermarket (chains) management will furnish Mathews Research a list of the items sold in their stores and the current selling price of each item on a regular, schedule e.g., weekly, bi-monthly, or monthly. Mathews Research will then enter each set of items and prices into a computer data bank for future retrieval. Retrieval of data will be in several forms depending on individual clients' needs as described below.

The first and major service is providing pricing information to the supermarket chains who furnished Mathews Research with the original data. Participating chains would purchase from Mathews Research the list of items sold in the area supermarkets with each chain's prices. Reports will be published on a regular basis at the

* Not reproduced herein.

frequency desired by the client: weekly, bi-monthly or monthly. (See appendix 1)*

Other services available to supermarket chains will be lists of the highest prices for each item, the lowest price for each item, the average price for each item and after a period of time price trends per item or per chain.

The second service is to provide food and grocery manufacturers and suppliers with the itemized prices of their goods sold by each supermarket chain. Product managers and brand managers in using this service will be able to track the actual selling prices of their products.

A third service is to Government, public service groups or individuals whereby price information would be for sale on a customized basis. Here the data bank can be addressed to retrieve the information in any manner which suits the needs of the client.

Section 2. Variations which may or may not affect the legality.

What effect on the legality of the proposed service would the following variations have:

1. Chain stores are identified by name on the reports.

2. Chain stores are not identified by name but are masked by listing them as Chain or Supermarket "A", "B", "C" etc.

3. Agreement made with chain furnishing prices that Mathews Research would not sell data to a competitor unless that competitor furnishes their price list in the same manner as all other participants.

4. Agreement made with supermarkets furnishing data that no use of the data would be made other than the distribution to firms who furnished the data.

5. Price lists are purchased (rather than furnished without consideration) from participating chain stores and collated data in turn sold back to them.

* Not reproduced herein.

Compliance opinion as to whether a furniture manufacturer's proposed plan to grant special price quotations, under certain conditions, to dealers competing in bid situations would violate order issued June 30, 1967, 71 F.T.C. 1579. [*Docket No. C-1248, Herman Miller, Inc., October 11, 1978*]

*Opinion Letter (Revised)**

October 11, 1978

Dear Mr. Moran:

The Commission has considered your request for advice, pursuant to Section 3.61(d) of the Commission's rules, regarding the propriety of a proposed course of action, as set forth in your letter of May 15, 1978. That letter modified your previous two communications, dated April 27, 1977 and August 5, 1977, which were the subject of Commission action on January 6, 1978, wherein the Commission advised that it could not approve your proposal as then constituted. As modified, you seek a determination of whether a plan wherein Herman Miller would grant special price quotations to dealers competing in bid situations would violate a Commission order of June 30, 1967 in the captioned matter.

As presently constituted, the plan would grant special price quotations to dealers in bid situations only. In order to receive the special price in a specific situation, a dealer would have to certify to Herman Miller that (1) it will submit a bid on that job, and (2) that on that job it will not bid products competitive to those products for which it obtains special price quotations from Herman Miller. All dealers which carry the Herman Miller line of products will be notified of the availability of this special pricing.

This plan would operate in the context of bid solicitation by institutions. When an institution solicits a bid, it may do so either by reference to descriptive specifications or by brand name. If brand names are specified, different items may call for different brands.

It is the Commission's understanding that, under the plan as modified by your letter of May 15, 1978, without regard to whether bids are solicited by descriptive specifications or brand names, a multiple line dealer, which wishes to bid Herman Miller products for some items and competing brands for others, can receive Herman

* For background correspondence and original opinion letter, see 91 F.T.C. 1167.

Miller's special pricing on the items for which it bids Herman Miller products.

Under the circumstances, the Commission is of the opinion that the modified proposal would not contravene the Robinson-Patman Act or the outstanding order in this matter. Inasmuch as any Herman Miller dealer will have the option of receiving special pricing on any given item, the Commission believes that the proposed plan is functionally available to all dealers, and hence not discriminatory.

The Commission wishes to note, however, that this advice should not be construed as indicating approval of the condition that a dealer must agree not to bid a competitor's products on items for which Herman Miller has quoted a special price. The Commission understands that respondent has stated that in this respect respondent's proposal is equivalent to the practices of its competitors. Because an extensive investigation would be required to assess the competitive effect (apart from Robinson-Patman considerations), of such practices, the Commission expresses no opinion about that aspect of your proposal.

By direction of the Commission.

/s/ Carol M. Thomas
Secretary

Letter of Request

May 15, 1978

Dear Mr. Thomas:

We are writing on behalf of our client, Herman Miller, Inc., to request the Commission's advice with respect to the propriety of the following described proposed course of action under the Commission's outstanding order entered with the Company's consent on June 30, 1967.

We previously requested the Commission's advice regarding a similar course of action which was the subject of the Commission's response dated January 31, 1978. Based upon that response, we have consulted with the Company, and the Company has decided to modify its proposed program and resubmit the matter for the Commission's advice. Accordingly, we hereby incorporate the materials which we previously submitted for the Commission's consideration in connection with the response of January 31, 1978, and request the Commission's advice on that proposed course of action, as modified by this letter.

Under the program as originally proposed, a dealer would have been denied special pricing if the dealer proposed to bid Herman Miller products for a portion of the bid items and competing brands for other bid items in situations where the bid solicitation identified the products to be bid by descriptive specifications rather than brand names. The Company now proposes to delete that feature from its proposed program so that dealers would be entitled to mix their bids by bidding Herman Miller products for some items and competing brands for other items. In all other respects, the proposed program would remain the same as that described in our prior communications to the Commission which were the basis for the Commission's response of January 31, 1978.

Based upon our review of the Commission's prior advice and a subsequent discussion with the Commission's Staff, we believe that the program in its modified form will be acceptable, and we respectfully request the Commission's advice as whether the proposed course of action will, if pursued by the Company, constitute compliance with the Commission's outstanding Order. We are hopeful that the Commission will give this request expedited treatment in view of the fact that the request is based on a subject which was recently considered by the Commission and its Staff. Of course, we will be happy to supply any additional information or clarification as the Staff deems necessary. Thank you for your consideration.

Yours very truly,
VARNUM, RIDDERING, WIERENGO
& CHRISTENSON
/s/ J. Terry Moran

Prohibition of proposed course of action whereby automobile dealers entering into service contracts with vehicle purchasers at the time of sale seek to limit the duration of implied warranties therein. [*File No. 793 7001, Rain, Harrell, Emery, Young and Doke, November 30, 1978*] (pub 43 FR 57244, Dec. 7, 1978)

Opinion Letter

November 30, 1978

Dear Mrs. Stevenson:

This is in response to your letters of October 4th and 18th, 1978 requesting an advisory opinion as to whether Section 108 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2308, would prohibit a proposed course of action for your clients. Your clients, automobile dealers who enter into service contracts with vehicle purchasers at the time of sale, propose to limit the duration of implied warranties to the duration of the service contract.

Section 108(a) of the Act flatly prohibits any modification of implied warranties by a supplier when a full warranty is offered or a service contract is entered into. This section states:

> No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

Section 108(b) of the Act creates an exception to the general rule in Section 108(a) in the following manner:

> For purposes of the title (other than section 104(a)(2)), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

The exception in Section 108(b) does not refer, however, to service contracts or provide for the limitation of implied warranties in service contracts. In fact, the provision specifically requires that any permitted limitation of implied warranties be "prominently displayed *on the face of the warranty*" (emphasis added). Had Congress intended the exception to apply to service contracts as well, Section 108(b) would read ". . . prominently displayed on the face of the warranty or service contract." Further, there is no other section of

the Act that could be interpreted to allow the course of action you have proposed.

Section 108(b) would thus not except the proposed course of action from the general prohibition against disclaimer or limitation of implied warranties in Section 108(a) of the Act.

By direction of the Commission.

Supplemental Request Letter

October 18, 1978

Dear Mr. Thomas:

Earlier this month I submitted a request for a formal Commission Advisory Opinion under the Magnuson-Moss Warranty Act (the "Act"). The question was whether Section 108 of the Act would allow an automobile dealer to limit the duration of implied warranties when a service contract is entered into at the time the vehicle is sold.

Mr. Jeffrey Karp of your office has asked me whether our clients are offering any type of warranties in connection with the sale of the vehicle and the service contract. I did not include this information in my earlier letter since it was my understanding that the Commission believed that the sale of a service contract precluded the limitation of the duration of implied warranties regardless of what type of written warranty was offered.

Our clients inform me that the person who buys the car receives the usual manufacturer's warranty and does not receive any type of warranty, either full or limited, from the dealer selling the vehicle and service contract.

I understand that in this case the Commission feels it is "clear on the face of the statute" that no limitation may be made on the duration of an implied warranty. More specifically, the Commission states that such a limitation may be made only if the supplier offers *only* a limited warranty and does not offer a service contract as well. Although a statement to that effect does appear in the 1974 House Committee Report, there is nothing in the statute itself which even arguably supports this position. Indeed, the words "only" and "limited warranty" do not even appear in the text of Section 108 as it was finally adopted.

We again renew our request for a formal Commission Advisory Opinion on this matter.

Thank you for your consideration.

Very truly yours,
/s/ Cathleen Chandler Stevenson
(Mrs.) Cathleen Chandler Stevenson

Letter of Request

October 4, 1978

Dear Mr. Tobin:

Pursuant to the Federal Trade Commission Rules of Practice, I am writing to request a formal Commission Advisory Opinion under the Magnuson-Moss Warranty Act (the "Act").

We represent several automobile dealers who offer an extended service contract to persons purchasing new or used automobiles. These extended service contracts are purchased at the time the vehicle is sold. It is our understanding that the Commission's present interpretation of Section 108 of the Act precludes the limitation of the duration of implied warranties when a service contract is entered into at the time of the sale. Accordingly, we have so advised our clients, and they are presently not limiting the duration of implied warranties when a service contract is entered into at the time the vehicle is sold. To the best of our knowledge, none of these automobile dealers is currently the subject of any type of investigation by your office.

Our clients have inquired if they may limit the duration of implied warranties to the duration of the extended service contract. We have advised them to refrain from this course of action until we have received an Advisory Opinion from the Commission.

This question has already been the subject of several letters from the Commission Staff. Mr. Alan Rubin and Mr. Jeffrey Carp of the Bureau of Consumer Protection each drafted a response to this question when it was raised initially by the National Automobile Dealers Association (the "NASD"). An extensive brief on the issue was filed with the Commission by the NASD on April 3, 1978.

From my review of the Commission's previous letter, it is my understanding that the Commission interprets subsection (b) of Section 108 of the Act as permitting limitations on implied warranties when the only agreement offered by the supplier is a limited warranty. However, the text of subsection (b) does not specify that it applies solely in cases where the supplier offers only a limited warranty. Moreover, such interpretation would effectively read out the "except as provided in subsection (b)" exception clause in the general rule of subsection (a).

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Last week I attended a seminar in Dallas and visited with Mr. Christian S. White, Assistant to the Chairman, about the procedure for requesting this Advisory Opinion. Mr. White advised me that it would not be necessary for me to file a memorandum or brief along with this request. However, please feel free to contact me if you should desire any additional information.

Thank you for your consideration.

Very truly yours,
/s/ Cathleen Chandler Stevenson
(Mrs.) Cathleen Chandler Stevenson

277-685 O—79——68

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Proposed course of action by gerontology research foundation does not qualify for Non-Profit Institutions Act exemption to the Robinson-Patman Act. [*File No. 783 7007, Foundation for Later Life Enrichment Fund, July 19, 1978*] 1019

Cigarette companies advertising, without health warning disclosure, via recorded telephonic advertising messages, provided no interstate calls are involved held illegal. [*File No. 783 7010, Fonawin Corporation, August 18, 1978*] 1022

Legality of use of mathematical model to forecast gross volume of shipments within furniture industry. [*File No. 783 7011, Business and Institutional Furniture Manufacturers Association, September 19, 1978*] 1031

Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved. [*File No. 773 7016, Lorillard, September 26,1978*] .. 1035

When needed pharmaceuticals are unavailable or difficult to obtain, non-profit hospital may resell the needed pharmaceuticals to the general public as humanitarian gesture during emergency caused by medicaid strike. [*File No. 773 7009, St. Peter's Hospital of the City of Albany, September 27, 1978*] 1037

Proposed price reporting service for retail chain food manufacturers. [*File No. 783 7002, Mathews Research, September 29, 1978*] 1039

Compliance opinion as to whether a furniture manufacturer's proposed plan to grant special price quotations, under certain conditions, to dealers competing in bid situations would violate order issued June 30, 1967, 71 F.T.C. 1579. [*Docket No. C-1248, Herman Miller, Inc., October 11, 1978*] 1047

Prohibition of proposed course of action whereby automobile dealers entering into service contracts with vehicle purchasers at the time of sale seek to limit the duration of implied warranties therein. [*File No. 793 7001, Rain, Harrell, Emery, Young and Doke, November 30, 1978*] (pub 43 FR 57244, Dec. 7, 1978) 1050

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